TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1026

COLUMBIA BROADCASTING SYSTEM, INC.,
APPELLANT,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION AND MUTUAL BROADCASTING SYSTEM, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED MARCH 9, 1942.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1026

COLUMBIA BROADCASTING SYSTEM, INC.,
APPELLANT,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION AND MUTUAL BROADCASTING SYSTEM, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

	Original	Print
Record from D. C. U. S., Southern District of New York	1	1
Summons	2	1
Complaint	3	1
Exhibit "A"—Form of affiliation contract	17	12
Exhibit "B"—Order of Commission, May 2, 1941	23	17
Exhibit "C"—Opinion of Commission on rehearing	27	20
Order amending Commission's order of May 2, 1941	41	32
Dissenting opinion of Commissioners Case and Craven	44	34
Exhibit "D"—Order of Commission authorizing investigation, March 18, 1938	47	36
Exhibit "E"—Letter from Commission directing that certain evidence be presented, September 20, 1938	50	39
Exhibit "F"—Release issued by Commission announcing procedure for oral argument, November 28, 1940	56	43

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 24, 1942.
—9488

	Original	Print
Record from D. C. U. S., Southern District of New York—Continued		
Order amending complaint	60	46
Exhibit "B"—Report and order of Commission on Chain Broadcasting, May 2, 1941	64	49
Motion for temporary restraining order and preliminary injunction and notice thereof	224	221
Affidavit of William S. Paley	230	223
Exhibit "A"—Consolidated balance sheet as at December 28, 1940—Columbia Broadcasting System and subsidiary companies	268	253
Exhibit "B"—Statement of C. B. S. setting forth standards to which commercial programs are required to conform	269	254
Affidavit of Herbert V. Akerberg	278	260
Exhibits "A" to "T", inc.—Representative letters re cancellation of affiliation contracts	283	263
Plaintiff's additional affidavits:		
Kenneth L. Yourd	316	285
Exhibit "A"—Complaint in Civil Action in District Court of the United States for the Northern District of Illinois, Eastern Division, entitled "United States of America, Plaintiff, v. Columbia Broadcasting System, William S. Paley, Edward Klauber and Herbert V. Akerberg"	320	289
Herbert V. Akerberg	342	306
Exhibits "A" to "H", inc.—Correspondence between CBS and affiliates regarding F. C. C. Regulations and cancellation of affiliation contracts	348	310
Frank Stanton	358	316
Exhibit "A"—Outstanding CBS Special Events Programs Broadcast During 1941	370	327
Edward Klauber	374	328
Exhibit "A"—CBS European war coverage	382	335
Exhibit "B"—Columbia's War Coverage—a Memorandum to the CBS News Organization	389	340
Affidavits in opposition to plaintiff's motion for preliminary injunction:		
Telford Taylor	397	346
Fred Weber	398	347
Appendix "A"—List of stations affiliated with Mutual Broadcasting System, November 1, 1941	452	393
Appendix "B"—Comparison of facilities of broadcast stations affiliated with the four national networks, November 1, 1941	461	402
Appendix "C"—Affiant's letter to Mutual Stockholders, October 31, 1941	463	404

Record from D. C. U. S., Southern District of New York—Continued
Affidavits in opposition to plaintiff's motion for preliminary injunction—Continued
Fred Weber—Continued Original Print
Appendix "D"—Mutual's agreement with its Stockholders, October 31, 1941. 464 404
Appendix "E"—Mutual's proposed contract to conform to the revised regulations 466 406
Appendix "F"—Summary of available full-time commercial stations in metropolitan districts, etc., November 1, 1941..... 477 416
Appendix "G"—First cancellation of the Ballantine program 488 427
Appendix "H"—Final cancellation of the Ballantine program 490 428
Appendix "I"—Excerpts from trade journals on loss of Ballantine program.... 492 429
Appendix "J"—Excerpt from trade journal on March of Time program..... 496 432
Appendix "K"—Excerpts from trade journals on Coca-Cola program 497 433
Reply affidavit of Frank Stanton..... 500 435
Exhibit "A"—Table showing percentage changes in gross sales of network time, 1936-1941..... 505 440
Exhibits "B" to "I", inc.—Tables showing trend of gross sales of network time—MBS compared with CBS, NBC-Red and NBC-Blue, 1936-1941..... 507 442
Exhibits "J" to "M", inc.—Tables showing gross sales of network time by months, 1935-1941..... 511 446
Appearance of Federal Communications Commission... 513 448
Motion to dismiss complaint or, in the alternative, for summary judgment 515 449
Affidavit of Telford Taylor 517 450
Stipulation and order granting temporary suspension of Commission's order 523 454
Order granting leave to Mutual Broadcasting System, Inc., to intervene 525 455
Opinion, Hand, J. 528 456
Dissenting opinion, Bright, J. 538 468
Order dismissing complaint..... 541 470
Petition for appeal..... 542 471
Notice of appeal 543 471
Assignments of error..... 545 472
Motion for temporary restraining order pending determination of appeal and notice thereof 548 473
Affidavit of William S. Paley 549-a 474
Opinion, per curiam, on motion for temporary restraining order 558 480

	Original	Print
Record from D. C. U. S., Southern District of New York—Continued		
Findings of fact and conclusion of law relating to temporary restraining order	560	481
Decree granting temporary restraining order	562	482
Order allowing appeal	563	483
Citation	564	483
Bond on appeal (omitted in printing)	566	
Direction re transmission of original documents	571	484
Praecipe for transcript of record	573	485
Stipulation as to record (omitted in printing)	580	
Clerk's certificate (omitted in printing)	581	
Statement of points to be relied upon and designation of parts of record to be printed	582	487
Order noting probable jurisdiction	588	490

[fols. 1-2]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action, File No. 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendant.

SUMMONS

To the above-mentioned Defendant:

You are hereby summoned and required to serve upon John J. Burns, plaintiff's attorney, whose address is 40 Wall Street, New York, New York, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

George J. H. Follmer, Clerk of Court. (Seal of the U. S. District Court.)

Date Oct. 30th, 1941.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 3] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action, File No. 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

vs.

THE UNITED STATES OF AMERICA, Defendant

COMPLAINT

This is an action to set aside, annul and permanently enjoin the enforcement of certain portions of an order of the Federal Communications Commission (hereinafter re-

ferred to as "the Commission") denominated "Commission Order in Docket No. 5060 in the Matter of the Investigation of Chain Broadcasting", promulgated on May 2, 1941 and amended on October 11, 1941. Jurisdiction of this action is invoked under the provisions of Section 402(a) of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C. § 402(a)) as amended, and of the Urgent Deficiencies Appropriation Act (38 Stat. 219, 220; 28 U. S. C. §§ 41(28), 43-48 (1913), inclusive) as amended.

For a cause of action against the defendant, the plaintiff alleges upon information and belief:

First: The plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New York, and has its principal office and place of business in the City, County and State of New York, and within the Southern District of New York.

Second: The Federal Communications Commission is a Commission created by the Communications Act of 1934, [fol. 4] and is charged with executing and enforcing the provisions of that law.

Third: The plaintiff is engaged primarily in the business of operating a nation-wide network broadcasting system. The plaintiff and its predecessor company have been engaged in this business since 1927. There are issued and outstanding 1,716,277 shares of the capital stock of plaintiff of the par value of $2.50 each, listed and traded on the New York Stock Exchange, and owned by more than 8,000 stockholders. It has total assets of over $22,000,000, over $18,000,000 of which is devoted directly to network broadcasting. The plaintiff supplies network programs to 123 stations in 122 cities of the country, which programs can be heard by over 90% of the listening audience of the nation. At December 28, 1940 it employed over 1,800 persons regularly, excluding performing artists and musicians. It has entered into long-term contracts and commitments for the use of land and buildings, for the furnishing of news and special program features, and for the employment of musicians, for several years in the future, requiring payments to be made by the plaintiff in excess of $4,000,000. Its earnings from the operation of its network exceeded $3,000,000 in both 1939 and 1940.

Network broadcasting is an integral and necessary part of the American system of radio broadcasting, and its existence is essential to the fullest and most effective utilization of the radio facilities of the country. Many improvements in engineering, program quality and the general public service rendered by radio are due to the network system of broadcasting. It has been responsible largely for the growth of radio as a medium of public information, education, entertainment, and advertising.

Fourth: The operation of its network by the plaintiff consists essentially of the furnishing of radio programs for simultaneous broadcasting thereof by radio stations [fol. 5] to which these programs are transmitted from a central point of origination by means of service over wire telephone lines, contracted for and used by the plaintiff for this purpose. The plaintiff furnishes the stations commercial and sustaining programs. The commercial programs are those sponsored by an advertiser who pays for their broadcasting; the sustaining programs are not paid for by any advertiser, but are furnished by the network. The stations operate solely by virtue of licenses to operate issued by the Commission. Plaintiff furnishes these network programs to 115 such stations pursuant to contracts with such stations. These contracts are known in the broadcast industry as affiliation or outlet contracts, and the stations are known as network affiliates or outlets.

Fifth: Plaintiff's affiliation contracts are, in most cases, in the form shown in Exhibit "A", annexed. The material provisions are substantially as follows:

1. Plaintiff agrees to furnish to the station an average of at least 60 hours per week of network sustaining and sponsored programs.

2. Plaintiff will furnish all available network sustaining programs without charge. It will furnish to the station all commercial programs which the sponsor requests the station to broadcast. In turn, the station will be paid a specified hourly rate for the use of its facilities in broadcasting network commercial programs. Usually this hourly rate paid to the station is graduated upward as specified totals of network commercial hours are successively attained by the station.

3. The station will not broadcast programs from any other network, except special events of public importance, from occasional local, state, or regional hook-ups.

4. Plaintiff will not furnish its programs to any other standard broadcast station in the city in which the station is located, except in case of public emergency.

[fol. 6] 5. The station will, upon not less than 28 days' notice from plaintiff, broadcast the sponsored or commercial programs furnished to it by plaintiff, provided that:

(a) The station need not broadcast such programs for more than 50 "converted hours" (on the average this requires 79 regular clock hours) in any one week,

(b) The station may substitute its own sustaining programs devoted to education, public service, or events of public interest, and

(c) The station may reject any network sponsored program which it deems not in the public interest.

6. The station is free to, but is not required to broadcast the network sustaining programs.

7. The contracts are usually for a term of 5 years with the plaintiff having the right, in some instances, to terminate on 12 months' notice.

Sixth: These contracts constitute a relationship between the plaintiff and the affiliated stations which is and has been valuable and advantageous to both. The provisions of the contracts alleged in Paragraph Fifth are indispensable to the efficient operation of the plaintiff's business. They are necessary and essential for the creation and maintenance of the plaintiff's identity as a network and of its public goodwill. They are necessary to enable plaintiff to compete with printed media such as magazines and other publications of national circulation, outdoor advertising and the like. Agreements of this character between networks and outlet stations are indispensable to the existence of a strong and efficient system of network broadcasting. They assure a better, fuller and more effective use of the radio facilities of the nation than any system of network broadcasting without them.

[fol. 7] Seventh: On May 2, 1941 the Commission issued a report, and the order which, as amended, is complained of in this action. The original order was designated "Commission Order in Docket No. 5060 In the Matter of the Investigation of Chain Broadcasting, May 2, 1941". The amendment to the said order of May 2, 1941 was made by an order which the Commission issued on October 11, 1941. On the latter date the Commission also issued a supplemental report, denominated herein its "Opinion On Rehearing." A copy of the order of May 2, 1941 is hereto annexed and marked Exhibit "B". A copy of the Opinion on Rehearing, the Dissenting Opinion On Rehearing, and the order issued October 11, 1941, is hereto annexed and marked Exhibit "C".

The order of May 2, 1941, as amended by the order of October 11, 1941, promulgated certain Rules, among them the following:

"3.101. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization [1] under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.

"Section 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

[fol. 8] "Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrange-

[1] The term "network organization", as used herein, includes national and regional network organizations.

ment, or understanding express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

"Section 3.104. No license shall be granted to a standard broadcast station which options[1] for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours[2] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.[3] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or

3.105. No license shall be granted to a standard broadcast station having any contract, arrangement, or under-

---

[1] As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.
all of the time covered by the option, or other time, to other network organizations."

[2] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

[3] These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

[fol. 9] standing, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance."

On July 22, 1941 the Commission deferred the effective date of the order of May 2, 1941, with respect to existing contracts, arrangements or understandings, until September 16, 1941. On August 28, 1941 the Commission further postponed the said effective date to a time to be fixed by the Commission. By its order of October 11, 1941 the Commission fixed the said effective date at November 15, 1941:

"It is Further Ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

The purposes, terms and effect of these Rules are to prohibit station licensees from having agreements of the kind and character alleged in Paragraph Fifth, which are [fol. 10] essential to the efficient operation of the system of network broadcasting.

Eighth: The report and order originated in an investigation instituted by the Commission on its own motion into network or chain broadcasting. The Commission authorized the investigation on March 18, 1938 by Order

No. 37, hereto annexed and marked Exhibit "D". On April 6, 1938 a Committee of three Commissioners was appointed by the Commission to supervise the investigation, to hold hearings in connection therewith, and to make reports to the Commission with recommendations for action by the Commission.

The plaintiff was made a respondent and party to the proceedings in this investigation and together with other respondents was directed to produce evidence on the subject of network broadcasting, by a letter of the Commission dated September 20, 1938 annexed hereto and marked Exhibit "E".

Between November 14, 1938 and May 19, 1939 the Committee held legislative hearings pursuant to public notice. On June 12, 1940 the Committee submitted its report to the Commission. In November, 1940, upon invitation of the Commission given at the request of the networks, briefs in the proceeding were filed on behalf of plaintiff as well as other national networks and interested parties, discussing the issues raised by the report of the Committee. On November 28, 1940 the Commission issued a public release, annexed hereto and marked Exhibit "F", announcing oral arguments to be held before the full Commission and directed to the Committee report and to certain draft Rules. The oral arguments before the full Commission were presented by the parties on December 2 and 3, 1940. On January 2, 1941 supplementary briefs were filed on behalf of the nation-wide network organizations discussing the jurisdiction of the Commission with respect to matters [fol. 11] covered by the Committee report and the draft Rules.

In the briefs filed in November, 1940 at the oral arguments before the full Commission and in the supplementary briefs, the plaintiff and several other respondents and parties to the proceedings in the investigation urged

1. That the Commission had no jurisdiction to promulgate regulations concerning the matters treated in the Committee Report and the draft Rules;

2. That the customs and practices proposed to be prohibited or restricted by the recommendations of the Committee Report, and the draft Rules, were indispensable to network broadcasting and to the most effective utilization of the radio facilities of the nation; and,

3. That the prohibition or restriction of these customs and practices of the industry was not required by and would not serve the public interest, convenience and necessity, was not necessary to carry out the provisions or the purposes of the Communications Act of 1934, and was in fact contrary to the public interest, convenience and necessity and to the provisions and the purposes of the Communications Act of 1934.

As stated in Paragraph Seventh, on May 2, 1941 the Commission made its report and the order which was later amended.

On August 14, 1941 Mutual Broadcasting System, Inc. petitioned the Commission to amend Rules 3.103 and 3.104. On August 28, 1941 the Commission set the petition down for hearing on September 12, 1941 and ordered at the same time a rehearing upon all the Rules, inviting all parties to present briefs and oral arguments and suggestions, but no further testimony. On September 12, 1941 a full rehearing was had upon briefs and oral arguments. Among [fol. 12] other parties appearing, plaintiff filed a statement and its counsel presented oral argument reiterating its former position with respect to the Rules and urging that the Commission set the Rules aside. On October 11, 1941 the Commission issued the Opinion on Rehearing and amended order.

Ninth: Prior to May 2, 1941 stations licensed by the Commission have had a reasonable expectancy of the annual renewal of their licenses, and it has been the practice of the Commission to renew the license of stations annually. The licenses held by such stations having affiliation contracts with plaintiff come up before the Commission for the granting or refusal of a renewal thereof at various times commencing in the immediate future and in no case later than one year from the present. The Commission has determined that it will revoke or deny the renewal of the license of any station having such affiliation contract after the effective date of the Rules referred to in Paragraph Seventh. When their current licenses expire, at the latest, and perhaps at an earlier date through the revocation of their existing licenses before expiration, such stations face the loss of their licenses if they perform or continue in

force or renew any existing contracts containing the provisions described in Paragraph Fifth.

Since the stations fear the loss of their broadcasting licenses, as a result of the Rules, they will not negotiate for or enter into the affiliation contract described in Paragraph Fifth with the plaintiff; nor will they negotiate for or enter into the renewal of such affiliation contracts with plaintiff as have recently expired or are about to expire. One hundred fifteen stations licensed by the Commission have such contracts with the plaintiff expiring at various times between the original effective date of the Rules and December 31, 1947. Because these stations fear the loss of their licenses, as a result of the Rules, they have [fol. 13] threatened to cancel and repudiate their affiliation contracts with plaintiff. Many stations have already notified the plaintiff that because of the Rules they will not be bound by their contracts with the plaintiff after the date when the Rules become effective as to existing contracts.

Tenth: As a result of the foregoing, plaintiff's ability and freedom to contract with existing and prospective affiliates is seriously restricted. Further, the obligations of existing contracts between stations and the plaintiff are necessarily destroyed on the effective date of the Rules. The Rules impair seriously the ability of the plaintiff to compete for national advertising with other national advertising media. They impair seriously plaintiff's ability to maintain its identity and the public goodwill which it has built up since its inception. They impair seriously the ability of the plaintiff to render a wide public service of informing, educating and entertaining the nation. They will make the operation of the plaintiff's business burdensome and more costly, reduce its earnings, compel plaintiff to change the fundamental character of its business, and render its property and business less valuable.

A network system of broadcasting, such as presently operated by plaintiff, and based upon affiliation contracts containing the provisions alleged in Paragraph Fifth herein is essential to the public interest, convenience and necessity, and indispensable to the fullest and most effective use of the radio facilities of the country. The Rules burden and weaken this network system of broadcasting to a serious extent. The Rules will thus inevitably result in decreasing the amount and quality of the radio program

service rendered the public, and thereby hinder and impede the most effective utilization of the radio facilities of the country.

Eleventh: That portion of the order promulgating the Rules referred to in Paragraph Seventh is illegal and void [fol. 14] for the reason that the Commission is without statutory authority to make such Rules.

Twelth. That portion of the order promulgating the Rules referred to in Paragraph Seventh is illegal and void and beyond the power or authority of the Commission for the reasons that:

1. The Rules are unreasonable, arbitrary and destructive of plaintiff's business without legitimate reason.

2. The Rules are not required by and do not serve the public interest, convenience and necessity.

3. The Rules are not necessary to carry out the provisions or the purposes of the Communications Act of 1934.

4. The Rules are in fact contrary to the public interest, convenience and necessity, and to the provisions and purposes of the Communications Act of 1934.

Thirteenth: If the Communications Act of 1934 purports to authorize the Commission to make the Rules complained of, the said Act is, in this respect, unconstitutional and exceeds the powers of Congress because it delegates legislative power to the Commission without adequate legislative standards, contrary to Article I Section 1 of the Constitution of the United States, and because it takes the property of the plaintiff without due process of law in violation of Amendment V thereto.

Fourteenth: Unless the enforcement of that portion of the order referred to in Paragraph Seventh be permanently enjoined by the Court, plaintiff will be unable to negotiate with station licensees for the affiliation contracts described in Paragrah Fifth, or for the renewal of existing affiliation contracts. Station licensees threaten to and will cancel or repudiate subsisting contracts. Plaintiff's ability to negotiate contracts with advertisers and contracts with labor [fol. 15] organizations of technical workers and of performing artists will be destroyed or seriously iimpaired. The penalty which affiliated stations will incur for enter-

ing into or performing agreements contrary to the said regulations is so serious that no station will renew or perform any such existing agreements even for the purpose of testing the validity of the Rules. Unless relief is granted in this action, plaintiff will therefore be compelled to submit to the consequences of the Rules whether they are valid or not. Plaintiff's business identity and public goodwill will be substantially injured and its property and business rendered substantially less valuable. In the premises, plaintiff will suffer irreparable injury for which it has no adequate remedy at law.

Wherefore, plaintiff prays that the Court set aside, annul and permanently enjoin the enforcement of that portion of the order of the Commission which promulgates the Rules complained of in Paragraph Seventh and that the Court grant the plaintiff such other and further relief as may be just and equitable in the premises.

Signed: John J. Burns, Attorney for Plaintiff, Business and P. O Address, 40 Wall Street, New York City.

[fol. 16] *Duly sworn to by William S. Paley. Jurat omitted in printing.*

[fol. 17] EXHIBIT "A" TO COMPLAINT

Form of Affiliation Contract

Agreement between Columbia Broadcasting System, Inc.,* 485 Madison Avenue, New York, New York and ——** licensed to operate —— —— radio station —— —— at —— full time on a frequency of —— with a power of ——.

Columbia is engaged in operating a radio broadcasting network and in furnishing programs to radio stations on the network over program transmission lines leased by Columbia or otherwise. Some of such programs, herein called "sponsored programs", are sold by Columbia for sponsorship by its client-advertisers. All non-sponsored

---

* Herein called Columbia.
** Herein called the Station.

programs are herein called "sustaining programs". The Station and Columbia recognize that the audience regularly listening to the Station will be increased, to their mutual benefit, if Columbia provides the Station with programs not otherwise locally available, including broadcasts from the scenes of national and international events, presentations of music, drama and other entertainment from the principal centers of talent, informative, educational and cultural broadcasts of general interest and other programs of public acceptance and value.

Accordingly, it is mutually agreed as follows:

1. Columbia will furnish to the Station for broadcasting by the Station all available network sustaining programs, without charge, and Columbia network sponsored programs for which clients may request broadcasting by the Station [fol. 18] and which are consistent with Columbia's sales and program policies. Columbia agrees that it will make available to the Station an average of at least sixty hours per week of network sustaining and sponsored programs. Network sustaining programs made available by Columbia are for sustaining use only and may not be sold for local sponsorship or used for any other purpose without the consent of Columbia in specific instances.

2. The Station will broadcast all network sponsored programs furnished to it by Columbia during the time when the Station is licensed to operate; provided, however, that except in connection with occasional sponsored programs of special events (such as World Series broadcasts) during periods of not more than two weeks each, the Station need not in any week broadcast network sponsored programs totaling more than fifty "converted hours" (as defined below, but for this purpose computed during the entire term of this agreement on the basis of the differences in rates at different hours specified in Columbia's Rate Card No. 23). The Station may require Columbia to give not less than twenty-eight days' prior notice of the commencement of sponsored programs for new accounts. Either the Station or Columbia may on special occasions substitute for one or more of such sponsored programs sustaining programs devoted to education, public service or events of public interest without any obligation to make any payment on account thereof, and in the event of such substitution by either

party it will notify the other by wire as soon as practicable after deciding to make such substitution. In case the Station has reasonable objection to any sponsored program or the product advertised thereon as not being in the public interest the Station may, on three weeks' prior notice thereof to Columbia, refuse to broadcast such program, unless during such notice period such reasonable objection of the Station shall be satisfied. The Station will not make [fol. 19] commercial spot announcements in the "break" occurring in the course of a single network program or contiguous programs for the same sponsor and will, at the request of Columbia, desist from making commercial spot announcements in the "break" occurring before or after specified network programs.

3. Columbia will pay the Station for broadcasting network sponsored programs furnished by Columbia at the rates for "converted hours" specified in Schedule A attached hereto and hereby in all respects made a part hereof. A "converted hour" means an aggregate period of one hour during which there shall be broadcast over the Station one or more network sponsored programs for which Columbia shall charge its full night-time card rate for the Station. An aggregate period of one hour during which there shall be broadcast over the Station one or more network sponsored programs for which Columbia shall charge a fraction of its night-time card rate, such as its daytime card rate, shall be the equivalent of the same fraction of a "converted hour". Fractions of an hour shall for all purposes be treated as their fractional proportions of full hours at the same time of the day.

Payment to the Station will be made by Columbia for network sponsored programs broadcast over the Station within twenty days following the termination of Columbia's four or five week fiscal period, as the case may be, during which such sponsored programs were broadcast.

4. The Station will maintain and operate its facilities in accordance with the best practice in the broadcasting art and conduct of the industry and in accordance with good engineering practice, and will have such license or other agreements as shall be necessary to entitle the Station to broadcast copyrighted material included in programs to be furnished by Columbia.

[fol. 20] 5. If the power, frequency, time or manner of operation of the Station is changed, resulting in a substantial lessening of the value of the Station as an outlet for Columbia network programs, Columbia may at any time thereafter terminate this agreement on at least sixty days' notice to the Station.

6. Columbia will whenever practicable provide in advance notices of the programs to be furnished to the Station. In the event of any change of programs, Columbia will notify the Station as soon as possible and the Station will make every effort immediately to conform with the substituted programs.

7. Neither party shall be liable to the other for claims by third parties or for failure to operate facilities or supply programs for broadcasting if such failure is due to failure of equipment or action or claims by network clients, labor disputes or any cause or reason beyond the party's control.

8. Columbia will continue the Station as the exclusive Columbia outlet in the present standard broadcast band in the city in which the Station is located and will so publicize the Station, and will not furnish its exclusive network programs to any other station in the present standard broadcast band in that city, except in case of public emergency. The Station will operate as the exclusive Columbia outlet in the present standard broadcast band in such city and will so publicize itself, and will not join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations. The Station shall be free to join occasional local, state-wide or regional hook-ups to broadcast special events of public importance.

9. The obligations under this agreement are subject to all applicable laws, rules and regulations, present and fu- [fol. 21] ture, especially including rules and regulations of the Federal Communications Commission.

10. If the Station applies to the Federal Communications Commission for consent to a transfer of its license or proposes to transfer all or any of its assets without which it would be unable to perform this agreement, it will procure the agreement of the proposed transferee that, upon the consummation of the transfer, the transferee will assume

and perform this agreement, unless Columbia shall waive this condition in writing.

11. If either the Station or Columbia fails to insist upon strict performance of any of the covenants or conditions of this agreement, such failure shall not be construed as an election or as a waiver or condonation of any breach, or as a waiver or relinquishment for the future of any such covenants or conditions.

12. Columbia agrees that in the event it desires to offer television programs or program material or other programs or program material generally to television, short wave or ultra short wave stations, or to other stations not in the regular broadcast band, it will offer the same to any television, short wave or ultra short wave station, or other station not in the regular broadcast band, located in the city in which the Station is located, which may be owned by or affiliated with the Station before offering the same to any other such station located in the city in which the Station is located. The Station agrees that in the event it becomes the owner of or affiliated with any television, short wave or ultra short wave station, or other station not in the regular broadcast band, located in the city in which the Station is located, no arrangements shall be made involving the supplying to such station of television programs or program material or other programs or program material until Columbia shall have been advised of the terms [fol. 22] of any such proposed arrangements and shall have been given a reasonable opportunity to enter into similar arrangements with the Station upon terms as favorable to Columbia.

13. Any notice hereunder shall be sent to the parties at their respective addresses hereinbefore set forth.

14. This agreement has been made in the State of New York and shall be governed by the laws of that State applicable to contracts fully to be performed therein, and this agreement is not subject to oral modification.

15. As of the beginning of the term hereof, this agreement takes the place of and is substituted for any and all agreements heretofore existing between the parties hereto, subject only to the fulfillment of any accrued obligations thereunder.

The term of this agreement shall begin on —— —, ——, provided, however, that this agreement may be terminated at any time prior thereto by Columbia by sending written notice to the Station at least twelve months prior to the effective date of termination specified therein.

In Witness Whereof, this agreement has been signed by the parties and dated the — day of ——, 19—.

Columbia Broadcasting System, Inc., by —— ——, ——, by —— ——.

[fol. 23] EXHIBIT "B" TO COMPLAINT

Before the Federal Communications Commission

Washington, D. C.

Commission Order in Docket No. 5060

In the Matter of the Investigation of Chain Broadcasting

May 2, 1941

Whereas, the Commission on March 18, 1938, by Order No. 37, authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity;"

Whereas, on April 6, 1938, the Commission appointed a Committee of three Commissioners to supervise the investigation, to hold hearings in connection therewith, and "to make reports to the Commission with recommendations for action by the Commission;"

Whereas, the Committee held extensive hearings and on June 12, 1940, submitted its report to the Commission;

Whereas, briefs were filed and oral arguments had upon the Committee report and upon certain draft regulations issued for the purpose of giving scope and direction to the oral arguments; and

Whereas, the Commission, after due consideration, has prepared and adopted the Report on Chain Broadcasting to which this Order is attached;

Now, Therefore, It Is Hereby Ordered, That the following regulations be and they are hereby adopted:

3.101. No license shall be granted to a standard broadcast station having any contract, arrangement, or under- [fol. 24] standing, express or implied, with a network organization [1], under which the station is prevented or hindered from, or penalized for broadcasting the programs of any other network organization. See Chapter VII, A, 1.

3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. See Chapter VII, A, 2; and J.

3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise, for the affiliation of the station with the network organization for a period longer than one year: *Provided*, That a contract, arrangement, or understanding for a one-year period, may be entered into within sixty days prior to the commencement of such one-year period. See Chapter VII, B.

3.104. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time. See Chapter VII, C.

[fol. 25] 3.105. No license shall be granted to a standard broadcast station having any contract, arrangement, or

---

[1] The term "network organization," as used herein, includes national and regional network organizations. See Chapter VII, J.

understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance. See Chapter VII, D.

3.106. No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control [2] with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. See Chapter VII, E.

3.107. No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network. See Chapter VII, F.

[fol. 26] 3.108. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs. See Chapter VII, G.

---

[2] The word "control," as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

It is Further Ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contract, arrangements, or understandings or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further*, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties.

Federal Communications Commission, T. J. Slowie, Secretary.

[fol. 27] EXHIBIT "C" TO COMPLAINT

[fol. 28] OPINION ON REHEARING

October 11, 1941.

On May 2, 1941, the Commission promulgated its Report on Chain Broadcasting accompanied by eight regulations setting forth a statement of the policy to be followed by the Commission in licensing stations owned by or affiliated with network organizations. The concluding paragraph of the order promulgating the regulations dealt with their effective date, which, with respect to existing affiliation contracts and station licenses, was set at 90 days from the date of the order.[1] On June 13, 1941 the Commission amended the concluding paragraph of the order to clarify its intent that the 90-day deferment periods mentioned in that paragraph should apply to the disposal of one NBC network as well as to the disposition of individual stations by networks, and further that the effective date of compliance in either case might be extended from time to time in order to permit the orderly disposition of properties.

Extensive hearings before the Senate Committee on Interstate Commerce were held during June, 1941 on the White Resolution [2] which called for a study of the Commis-

---

[1] *Report on Chain Broadcasting*, Commission Order No. 37, Docket No. 5060, May, 1941.

[2] Senate Resolution No. 113, 77th Congress, 1st Session. The Resolution, introduced by Senator White, provided for an investigation of the probable effects of the regulations upon the broadcasting industry and of the authority of the

sion's Chain Broadcasting Regulations. During July and August, following these hearings, representatives of NBC, CBS, and Mutual held a series of conferences with the Chairman of the Commission, its General Counsel and members of his staff, and, in the later stages, with Commissioner [fol. 29] Walker. Representatives of some of the regional networks and some of the affiliates also conferred with members of the Commission and its staff during this period.[3] These conferences were devoted to a discussion of the Chain Broadcasting Regulations, with particular emphasis upon the provisions dealing with network option time. On July 22, 1941, during the course of these conferences, the Commission, on petition of NBC and CBS, postponed the effective date of its Order of May 2, 1941, as to existing affiliation contracts, network organization station licenses, or the maintenance of more than one network by a single network organization, from July 30 until September 16, 1941.

At the termination of these conferences, the Mutual Broadcasting System on August 14, 1941, filed with the Commission a petition requesting it to amend its regulations dealing with network option time and the duration of affiliation contracts. The Mutual petition requested that the Commission permit affiliation contracts up to two years in duration and allow stations to option exclusively to one network the particular periods of time utilized by the network for network commercial programs during the preceding year and to option additional time to one or more networks on a non-exclusive basis; in either case the station to reserve several hours per day free from any network option. On August 28, 1941, Mutual's petition was set for argument before the Commission *en banc* on September 12, 1941 and the Commission announced that at that time it

---

Commission to promulgate and enforce them, and also requested the Commission to postpone the regulations until 60 days after the Senate Interstate Commerce Committee reported to the Senate. The hearings before the Committee were adjourned on June 20, 1941, subject to the call of the Chairman.

---

[3] *Cf.* Report of the Committee on Administrative Procedure, Sen. Doc. No. 8, 77th Cong. 1st Sess. (1941) pp. 35-42.

would also hear any other network organizations or licensees who desired to be heard with respect to the Chain Broadcasting Regulations as promulgated, the Mutual petition, or any other modification of any of the Chain Broadcasting Regulations which those appearing desired to propose. The Commission further announced that the Chain Broadcasting Regulations would not be placed in effect with respect to existing affiliation contracts, or network organ- [fol. 30] ization station licensees, or the maintenance of more than one network by a single network organization, until after the disposition of the Mutual petition and of any other which might be filed. Oral arguments on the Mutual petition were heard before the Commission *en banc* on September 12, 1941. Oral arguments were presented on behalf of the Mutual Broadcasting System, the National Broadcasting Company, the Columbia Broadcasting System, and the Colonial and Yankee Networks, and briefs were filed on behalf of the three nation-wide network organizations.

After a careful study of the testimony presented before the Senate Committee on Interstate Commerce, of the considerations presented at the conferences which followed the hearings, and of the oral arguments presented at the hearing on Mutual's petition and of the briefs filed at that time, and after a thorough reconsideration of the entire subject, the Commission has decided to amend three of the Chain Broadcasting Regulations to read as follows:

Regulation 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

Regulation 3.103. No license shall be granted to a standard broadcast station having any contract arrangement, or

understanding, express or implied, with a network organ- [fol. 31] ization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

Regulation 3.104. No license shall be granted to a standard broadcast station which options[1] for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours[2] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.[3] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

Territorial Exclusivity.

At the hearings on the White Resolution it was argued on behalf of NBC and Columbia that Regulation 3.102 would

---

[1] As used in this regulation, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

[2] All time options permitted under this regulation must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified option hours correspondingly as agreed by the station and network organization.

[3] These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

[fol. 32] permit the largest and most powerful stations in each city to take most of the desirable network business away from the smaller and less powerful stations, and that the elimination of territorial exclusivity would prevent a regular affiliation between a network organization and a station.

In order to clarify the meaning of Regulation 3.102 the Commission has determined to add the following sentence to that regulation:

"This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization."

This sentence does not change the meaning [1] of Regulation 3.102 but is intended to eliminate confusion with respect to its interpretation. Regulation 3.102 is not intended to and does not prohibit a regular affiliation contract whereby a network agrees to make a first offer of all its programs to one particular station in a given community. The Commission believes, however, that in the case of non-commercial public service programs of outstanding national or international significance, such first offer should not constitute an exclusive offer and that the network should be left free to furnish such programs to other stations in the same area.

Duration of Affiliation Contracts

Under present rules the license of a standard broadcast station is limited to one year. The broadcast industry has reached a point of maturity where it appears advisable to increase the license period of standard broadcast stations to two years. The Commission believes that this action will [fol. 33] bring an increased measure of stability to the broadcast industry without any detrimental results. By

[1] In its public notice No. 51314 dated June 19, 1941, the Commission informally approved the new Mutual network form of contract which contained a provision giving the station the first call on Mutual network commercial and sustaining programs in the city in which the station is located.

separate action taken this day we are amending Sections 3.34 and 4.3 of our rules to accomplish this result.

In connection with the extension of the license period for all standard broadcast stations from one year to two years, the Commission has determined to license stations which have entered into affiliation contracts whose term is not longer than two years. In its report, the Commission found that the five-year affiliation contracts entered into by NBC and CBS were intended to prevent any real competition in the network-station market, and that such long term contracts were a substantial factor in suppressing such competition. The Commission found that as a result the public lost the benefits of competition between stations for affiliation with the existing networks, and was also deprived of the advantages that might flow from the establishment and development of new networks. In its report of May 2, 1941, the Commission found that no business need was shown for an affiliation contract longer than one year. The Commission also found that competition would be fostered if opportunity were provided for annual readjustments on the basis of comparative showings of networks and stations.

After a consideration of the arguments presented on Mutual's petition and a reconsideration of the entire subject of the duration of affiliation contracts, the Commission concludes that a two-year affiliation contract will permit a reasonable measure of stability in network-station relationships without at the same time seriously interfering with competition in the network-station market. Of course, what precise limit on the duration of affiliation contracts is most desirable is a matter of judgment. A two-year affiliation contract represents a substantial diminution from the five-year term currently being utilized by NBC and CBS, and may be expected to remove that restraint upon competition and give freer play to competitive factors by making possible readjustments between stations and networks on a biennial basis.

[fol. 34] Network Option Time

The option-time regulation promulgated by the Commission on May 2, 1941 (Regulation 3.104), prohibited all optioning of time by stations for network programs. That regulation was based upon the finding of the Commission that the optioning of time by licensee stations restricted

their freedom, interfered with their ability to serve local program needs, hampered their efforts to broadcast local programs, national spot, and other non-network programs, and restricted competition in network programs.

Notwithstanding these serious restraints imposed upon station licensees by network options, NBC and CBS utilize only a fraction of the valuable broadcast hours which they place under option. The NBC option for most of its affiliates covers 8 or 8½ specified hours per day, while the CBS option covers the entire broadcast day. Upon 28 days' notice, NBC and CBS may call upon their outlets to carry network commercial programs during the optioned time and to move whatever other programs they may have scheduled during those periods. In 1938 NBC used for network commercial programs only 58.1 per cent of the optioned time of stations on the basic Red network and only 19.4 per cent on the basic Blue network and CBS used only 39 per cent of the optioned time of its basic stations. The Commission found that this great disparity between option and use was an abuse which seriously interfered with the non-network program service of station licensees and restricted the broadcasting of programs of other networks.

The Commission is not convinced by the contention of NBC and CBS that the optioning of time by networks is indispensable to network operations, particularly since the chain broadcasting regulations, neither in their original form nor as herein amended, place any restrictions on the bona fide purchase of station time by networks. Networks have heretofore successfully operated without option time. However, it is clear that some optioning of time by networks in order to clear the same period of time over a number of stations for network programs will operate as a business [fol. 35] convenience. Within certain limits, it should be possible for stations to option time for network programs without interfering too seriously with their local program requirements, with their local and national spot business, and without restricting the access of competing networks to those stations. The Commission believes that the option-time regulation as herein amended accomplishes that result.

Under the amended regulation the broadcast day is divided into four segments: 8 a.m. to 1 p.m.; 1 p.m. to 6 p.m.; 6 p.m. to 11 p.m.; and 11 p.m. to 8 a.m. A station is permitted to option up to three hours during each segment

to one or more network organizations on a non-exclusive basis. The regulation provides that the hours covered by option must be specified hours for, if a roving option were permitted, the station would be effectively prevented from scheduling any non-network programs during any of the hours on which such roving option might conceivably settle. Stations are prevented by the regulation from optioning any time to networks subject to call on less than 56 days' notice. The call period currently being utilized is 28 days. This lengthening of the call period will give stations greater freedom in scheduling local and non-network national programs during the hours of the broadcast day which are subject to network option; for such programs, even though subject to be moved, may be assured of at least eight weeks of continuous broadcasting. Nor does it seem that the increase in the call period will seriously affect national network business; for the national networks have pointed out that theirs is a long-range business and that large-scale national advertising network programs are usually planned and arranged for many months and even a year or two ahead of the actual commencement of the broadcasts. Under such circumstances, it does not appear that a 56-day call period will impose any serious hardship upon national network operations.

One of the results of the amended option-time regulation will be that during at least two specified hours within each of the important three segments of the broadcast day— [fol. 36] morning, afternoon, and evening, a station may not option time for network programs, so that non-network programs may be scheduled during these hours without fear of removal as a result of network options. During the night segment, from 11 p.m. to 8 a.m., a station may option up to three hours for network programs. For the most part, programs broadcast within those hours have been local programs; but some networks, Colonial, for example, have originated programs during the early morning or late evening hours which have been broadcast by their outlets with apparent wide listener acceptance.

The amended option-time regulation does not require any station to option any time to any network; it simply sets the maximum amount of time which a station may place under option for network programs. Stations and networks are free to negotiate which specific hours are to be placed under option and how many hours, within the limits speci-

fied in the regulation, are to be placed under option. A network, by virtue of whatever option it is successful in negotiating, to that extent secures the right-of-way over local and national non-network programs during the time under option. But during at least two specified hours within each of the three more important segments of the broadcast day and during at least six hours of the night segment a station may not option time for network programs. Local and non-network national programs being broadcast within such periods may not be subjected to be moved as a matter of contract in order to accommodate network programs, and the networks may utilize such hours only by the outright purchase of time.

It has been the consistent intention of the Commission to assure that an adequate amount of time during the good listening hours shall be made available to meet the needs of the community in terms of public expression and of local interest. If these regulations do not accomplish this objective, the subject will be given further consideration.

By providing that the options for network programs must be on a non-exclusive basis, the amended option-time [fol. 37] regulation prevents the option-time device from being utilized to restrain competition offered by other networks. While a station is not compelled to option the same hours to more than one network, it may not enter into any arrangement with one network organization which prevents it from optioning or selling the same or other time to other network organizations. This is an all-important consideration in the many cities which contain only three full-time stations to which all four national networks seek access. Where a station options the same period of time to several networks, the mere existence of the option will not preclude network competition; for that period of time will be available for sale by all the networks holding the option. The first network which is successful in selling any particular period under option will, of course, reap the benefit of the option as long as the time remains sold. Although they have used only a fraction of the optioned time of their outlets, CBS and NBC have been able to prevent a competing network from using the unused time of their affiliates simply because those periods are under option to them. Under the amended option-time regulation, NBC and CBS will be able to exclude other networks only in the event and to the extent that they actually utilize the time under option.

The non-exclusive option should be instrumental in fostering competition between networks and at the same time should make it possible for a network organization to clear time over a number of stations for a network program. Without any optioning of time, the greatest obstacle in the way of clearing the same period of time over a number of stations for a network program would be the fact that many of the stations might have scheduled local and non-network national programs during various periods of the broadcast day. During whatever period of time is included within the non-exclusive option, local and non-network national programs will be subject to be moved on 56 days' notice. A station must remain free, however, to sell or option time, included within the non-exclusive option [fol. 38] period but not actually being utilized for a network commercial program, to one or more other network organizations.

After weighing the considerations in support of the non-exclusive option against those advanced in opposition, the Commission has come to the conclusion that the non-exclusive option appears to be a particularly appropriate solution of the problem of clearing time for network programs and at the same time of fostering competition in the network-station market.

The Commission has rejected the proposal, suggested but not unqualifiedly recommended in the Mutual petition, to permit a station to option exclusively to one network the particular periods of time utilized by that network for network commercial programs over the station during the preceding year. An exclusive option effectively removes a station from the station-network market with respect to all the time it covers. The Commission believes that such a serious restraint upon competition is inconsistent with the freely competitive system contemplated by Congress in the Communications Act of 1934. An exclusive option, to the extent that it encompasses the most valuable broadcast hours, approaches the effectiveness of the exclusivity clauses in affiliation contracts in denying other networks access to a station, and is therefore objectionable for many of the reasons given in the Report for the elimination of exclusive affiliation. Nor is the fact that a given network has utilized a particular period of time over a station any real justification for placing that time under exclusive option. The network which has a contract for a commercial

program with a sponsor and which has been sending that program to a number of its affiliated stations throughout a season already has an almost insuperable advantage in selling that program for another year; for commercial program series are frequently renewed year after year. To permit such a network to have an exclusive option over its affiliated stations on the periods used for commercial network programs would effectively destroy the possibility of competition for those periods.

[fol. 39] Multiple Network Operation by NBC

The Commission has determined to suspend indefinitely Regulation 3.107, which provides that no license shall be granted to a standard broadcast station affiliated with a network organization which maintains more than one network. Separate ownership of what are now the Red and Blue networks of NBC is so generally recognized to be desirable that we believe a separation will soon occur without the spur of a legal mandate. Any policy requiring the sale of substantial properties should be applied with due regard for the preservation of fair values, and the Commission wishes to avoid the semblance of pressure on NBC to effect a forced sale.

In addition to suspending this regulation, the Commission has provided that any subsequent order placing the regulation in effect shall provide for a period of at least six months between the announcement and the effective date, and for further extension of the effective date from time to time if necessary to prevent a forced sale. As amended, the paragraph setting forth the effective date of the Chain Broadcasting regulations reads as follows:

"IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely, and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice

and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

Other considerations have motivated the Commission in this decision. The Commission is desirous of seeing that [fol. 40] the network which is disposed of by NBC is transferred to a responsible new owner as a going organization with its personnel, talent, programs and stations intact as far as possible. NBC's existing affiliation contracts and those that it may negotiate in the future will be an important factor in the continued profitable and efficient operation of its networks. Therefore, pending the development of plans for the disposition of one of the NBC networks as a unit, the Commission has deemed it wise to suspend this regulation.

Conclusion

The Commission adheres to the views expressed in its report on Chain Broadcasting. It is of the opinion that the chain br-adcasting regulations will tend to decentralize the tremendous power over what the public may hear which is now lodged in the major network organizations, and will remove existing restraints upon competition without interfering unduly with the operations of the network organizations. The Commission has further concluded, however, that the regulations may be amended as set out above without sacrifice of these objectives, and that the amendments will additionally insure that no aspect of the network broadcasting structure will be unnecessarily or unduly disturbed.

For the reasons stated at pages 77 to 79 of its Report, the Commission has determined that its chain broadcasting regulations should be applicable to regional as well as national networks. Special circumstances and considerations may be applicable in the case of regional networks, and the Commission will examine any further representations on their behalf with especial care.

The Commision stands ready at all times to amend and modify its regulations upon the petition of any network, national or regional, or any station or group of stations if it can be shown that those regulations prevent profitable network operations, or unduly disturb any aspect of broadcasting, or that because of special or changed circumstances

the chain broadcasting regulations should not be applicable to any particular situation.

[fol. 41] FEDERAL COMMUNICATIONS COMMISSION,
WASHINGTON, D. C.

October 11, 1941.

ORDER

At a meeting of the Federal Communications Commission held at its offices in Washington, D. C. on the 11th day of October, 1941.

The Commission having under consideration the petition of the Mutual Broadcasting System, filed August 14, 1941, requesting that the Commission amend its order entered in Docket No. 5060 promulgating regulations applicable to radio stations engaged in chain broadcasting by modifying the regulations dealing with option time and the duration of affiliation contracts, having heard oral argument on said petition and having reconsidered its report and order in Docket No. 5060,

It Is Ordered, That the Commission's order of May 2, 1941, entered in Docket No. 5060, Be, and the Same is Hereby, Amended in the following particulars:

Sections 3.102, 3.103, and 3.104 of the Regulations set forth in said order are hereby amended to read as follows:

Section 3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the [fol. 42] station is granted the first call in its primary service area upon the programs of the network organization.

Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding express or implied, with a network organiza-

tion which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

Section 3.104. No license shall be granted to a standard broadcast station which options [1] for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours [2] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.[3] Such options may not be exclusive as against other network organizations and may not prevent or hinder the [fol. 43] station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

The last paragraph of said order is hereby amended to read as follows:

"It Is Further Ordered, That these regulations shall become effective immediately: *Provided*, That, with respect

---

[1] As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

[2] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

[3] These segments are to be determined from each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further,* That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further,* That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

T. J. Slowie, Secretary.

[fol. 44] Dissenting Opinion of Commissioners Norman S. Case and T. A. M. Craven, October 11, 1941

We disagree with the supplemental report of the Commission on Chain Broadcasting, in Docket 5060, for the same basic reasons previously outlined in our dissenting opinion, filed with the Commission's original report on this matter, dated May, 1941. We remain convinced that the majority of the Commission exceeds the power delegated to the Commission in the Communications Act of 1934. We also are convinced that the aggregate effect of the proposed rules will not result in a broadcasting system more in the public interest than that of today. We fear that the nation's radio service may be seriously impaired at a time when efficient service is most needed. Furthermore, we believe that the effect of the rules is certain to result in deterioration of the present excellent public service programs now rendered to the nation by the radio industry.

The effect of the regulations will be to change radically the business structure of the broadcast industry. The present is no time to force revolutionary reforms upon an industry which has served the public interest of the nation, particularly when such reforms bear no relation whatsoever to the national defense effort. The radio industry has cooperated wholeheartedly with the Government in this national emergency in spite of the fundamental and imminent changes in the national economic structure. These economic changes may cause vast readjustments in all industry as well as by the entire public. The cumulative effect of these

basic national economic readjustments upon the radio industry cannot be determined with accuracy at this time. Therefore, it appears to us that to add to the instability of the radio industry by enforcing new Government regulations, which in themselves superimpose fundamental economic readjustments, is unwise. There is no evidence in this record which justifies such a sweeping change as is compelled [fol. 45] by these new rules promulgated by the majority of this Commission. Any improvements which may seem desirable in the operation of the existing broadcast structure can be obtained in an evolutionary manner by far less harsh measures than those proposed by the majority in the instant case.

We do not condone unreasonable restraints upon competition within the broadcasting industry of this country and, therefore, advocate that if any abuses of this nature exist they should be corrected forthwith either by voluntary action within the industry or else by procedures undertaken by agencies of the Government having legal jurisdiction in the premises. Likewise, we subscribe to the doctrine of reasonable diversification in the control of the radio broadcasting channels. It is for this latter reason that we believe the ultimate separation of one of the two networks now operated by the National Broadcasting Company will be an improvement of benefit to the public.

In this respect, however, we believe that the Government should not force private enterprise to dispose of its property on an unsound business basis when such enterprise has rendered good service to the public, and particularly when, as in this case, the Government itself has previously given its tacit approval and encouragement to the enterprise. Consequently, we welcome the fact that the majority has suspended the effective date of its original regulation (Sec. 3.107) to force the sale of one of the networks now operated by the National Broadcasting Company.

Our present objection is centered on the modified regulation, 3.104. Ostensibly this regulation permits options to be taken by a network on an affiliated station's time. In reality, however, an affiliate must be free to option identical time to all networks regardless of affiliation. Under such conditions it should be obvious that absurd complexities may easily arise in the ordinary conduct of business. It is true that another regulation permits a station to contract with a network for first call on a network's program offerings.

[fol. 46] If it be reasonable for an affiliate to contract for first call on a network's programs, it is obviously reasonable for the network to obtain first call on the affiliate station's time. However, the latter is specifically prohibited by the regulation. Apparently by changing the regulation originally promulgated, the majority intended to recognize the practical business situation in broadcasting. It is our opinion that the new regulation does not accomplish this purpose and that networks in reality secure no substantial option privileges under this regulation. We believe that stations should be permitted to utilize the same option principles as is done in ordinary business.

The time has come to create stability in the radio industry rather than instability. We believe that service to the public would be enhanced by extending the broadcast station license period to the legal limit of three years. Network companies should be permitted to contract for regular affiliates with which they can engage in business in accord with sound business principles. In this connection we believe that an improvement in the existing situation can be obtained if network affiliates are free at all times to exercise final judgment as to whether or not any program offered to them by the network will service public interest in the community served by the station. We also believe that the affiliates should have equal power with the networks to terminate the affiliates' contract on due notice.

(Signed) Norman S. Case. (Signed) T. A. M. Craven.

October 11, 1941.

[fol. 47] EXHIBIT "D" TO COMPLAINT

Order Instituting Chain Broadcasting Investigation

Federal Communications Commission,

Washington, D. C.

March 18, 1938.

Order No. 37

Whereas under the provisions of section 303 of the Communications Act of 1934, as amended, "the Commission, from time to time, as public convenience, interest, or neces-

sity requires, shall—(1) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and

Whereas the Commission has not at this time sufficient information in fact upon which to base regulations regarding contractual relationships between chain companies and network stations, multiple ownership of radio broadcast stations of various classes, competitive practices of all classes of stations, networks, and chain companies, and other methods by which competition may be restrained or by which restricted use of facilities may result; Now therefore,

It Is Ordered, That the Federal Communications Commission undertake an immediate investigation to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity; such investigation to include an inquiry into the following specific matters, as well as all other pertinent and related matters, including those covered in the report on social and economic data prepared by the Engineering Department of the Federal Communications Commission and filed with the Commission on January 20, 1938:

[fol. 48] 1. The contractual rights and obligations of stations engaged in chain broadcasting, arising out of their network agreements.

2. The extent of the control of programs, advertising contracts, and other matters exercised in practice by stations engaged in chain broadcasting.

3. The nature and extent of network program duplication by stations serving the same area.

4. Contract provisions in network agreements providing for exclusive affiliation with a single network and also provisions restricting networks from affiliation with other stations in a given area.

5. The extent to which single chains or networks have exclusive coverage in any service area.

6. Program policies adopted by the various national and other networks and chains, with respect to character of programs, diversification, and accommodation of program characteristics to the requirements of the area to be served.

7. The number and location of stations licensed to or affiliated with each of the various national and other networks. The number of hours and the specified time which such networks control over the station affiliates and the number of hours and the specified time actually used by such networks.

8. The rights and obligations of stations engaged in chain broadcasting so far as advertisers having network contracts are concerned.

9. Nature of service rendered by each station licensed to a chain or network organization, particularly with respect to amount of program origination for network purposes by such stations.

[fol. 49] 10. Competitive practices of stations engaged in chain broadcasting as compared with such practices in the broadcasting industry generally.

11. Effect of chain broadcasting upon stations not affiliated with or licensed to any chain or network organization.

12. Practices or agreements in restraint of trade or furtherance of monopoly in connection with chain broadcasting.

13. Extent and effects of concentration of control of stations locally, regionally, or nationally in the same or affiliated interests, by means of chain or network contracts or agreements, management contracts or agreements, common ownership or other means or devices, particularly insofar as the same tends toward or results in restraint of trade or monopoly.

It Is Further Ordered, That hearings be held in connection with such investigation at such times and places as the Commission shall designate.

It Is Further Ordered, That a copy of this order be posted in the office of the Secretary and that a copy of the same be mailed to each licensee of a broadcast station and to each chain and network organization.

By the Commission.

T. J. Slowie, Secretary.

[fol. 50] EXHIBIT "E" TO COMPLAINT

Federal Communications Commission,

Washington, D. C.

September 20, 1938.

To Licensees of All Standard Broadcast Stations:

In Re: Commission Order No. 37, Docket No. 5060

GENTLEMEN:

Enclosed herewith find hearing notice issued with reference to Order No. 37 on which a hearing is scheduled to be held October 24, 1938 at the offices of the Commission in Washington, D. C., and a copy of said Order.

Also enclosed is an itemized list of the matters concerning which each network has been requested to furnish complete and detailed information at the hearing.

The Commission in its investigation under Order No. 37 plans to make a comprehensive study of all contracts, agreements and other arrangements between licensees of broadcast stations and other persons or organizations which involve the management, control, or operation of such stations. You are therefore directed to file within ten days from the date hereof, in triplicate, with the Commission copies of all such contracts or agreements affecting your station and a memorandum stating the substance of any such contract, agreement, or arrangement which has not been reduced to writing, together with a verified statement setting forth in detail the manner and extent to which the same affect in practice the management, control or operation of your station. This statement should include the names and addresses of the persons or organizations who are parties to the same. Any of this information which [fol. 51] may have already been filed with the Commission may be incorporated by an appropriate specific reference. You will be advised as soon as possible after the receipt of this information whether or not the Commission will require that you present through a qualified witness or witnesses at the hearing any further information with respect to this matter.

If you have access to or possess any evidence bearing on any phase of the investigation which you believe should

be presented for the consideration of the Commission, a notice of appearance should be filed in conformity with the notice of hearing, which is enclosed herewith.

You are also directed to file at the same time a detailed statement, properly verified, covering the kind and amount of electrical transcriptions or other recordings your station has used and now uses for program purposes, and your past and present relations with, and extent to which through stock ownership, contract or otherwise you control or are controlled by companies engaged in producing or distributing such recordings.

The order in which appearances will be called at the hearing will be published by the Commission as far in advance of the date of hearing as possible.

Very truly yours, (Signed) T. J. Slowie, Secretary.

Enclosures.

[fol. 52] (First Enclosure)

29491

Federal Communications Commission
Washington, D. C.

Notice of Hearing

In the Matter of Commission's Order No. 37

Docket No. 5060

Pursuant to Commission's Order No. 37 notice is hereby given that commencing at 10:00 A. M., October 24, 1938, at the offices of the Commission, Washington, D. C., the Commission will hear any person or organization desiring to present evidence on the matters included for investigation in Commission order No. 37.

Any person or organization desiring to be heard shall, within fifteen days from the date of this notice, file with the Commission a verified notice of its intention to be present and participate in said hearing and shall set forth in detail a complete statement of the evidence to be offered by such person or organization. An original and eight copies of such notice of appearance shall be filed.

Dated at Washington, D. C., September 20, 1938.

Federal Communications Commission, T. J. Slowie (Signed), Secretary.

[fol. 53] (Second Enclosure)

29484

Matters as to Which Each Network Shall Present Evidence at the Hearing Held Pursuant to Order #37

1. Corporate and financial history of network organization including detailed information on both direct and indirect ownership or control thereof;

2. Nature and character of activities engaged in by network from the date of its organization;

3. Name, number and location of all stations now or previously licensed to or affiliated in any manner with network with particular reference to the reasons for entering into or terminating any such affiliation and the basis upon which additional affiliations are entered into;

4. Nature of contracts, agreements or other arrangements between network and affiliates including reasons for various provisions of such contracts, agreements, or other arrangements, and history of the same;

5. Classification and grouping of stations connected with network as basic supplemental, etc., with reasons for same;

6. Financial arrangements between stations and affiliates, including basis for charges made by networks and affiliates;

7. The history and development of the network program policy, particularly with reference to standards which programs must meet, diversification, accommodation of program characteristics to the requirements of the area served, and program and advertising continuity;

8. Extent to which affiliates are required to conform to network program policy and extent to which affiliates control or influence policy;

[fol. 54] 9. History and development of operating policy and procedure with particular reference to contracts and agreements with wire companies for program transmission;

10. History and development of policy with respect to sale of time for advertising or other purposes, particularly with respect to standards applicable to products or services for which advertising is accepted;

11. Detailed information as to the hours which network controls over affiliated stations, the number of such hours actually used for network, commercial purposes over affiliated stations and the number of hours of network sustaining programs actually used by affiliates;

12. Rights of network and affiliates in event affiliate desires to substitute a local program for a network program.

13. History and development of agreements, contracts, or other arrangements between networks and advertisers, or other program sponsors, particularly and in detail agreements, contracts, or other arrangements with persons or organizations acting as agencies for the placing of broadcast advertising or the sale of time over the network;

14. History and development of policies with reference to the development of program talent and facilities of network organization devoted to that purpose;

15. Explanation and details of the organization, function, policies and practices of any agency directly or indirectly controlled by the network organization which retains and procures talent for the purpose of selling such talent to the sponsors of commercial radio programs:

16. The nature of the service rendered by each station licensed to the network, particularly with respect to the amount of program origination for network purposes at [fol. 55] such stations and with respect to the nature of the local service rendered by such stations;

17. Name of any national advertising agency, user, or national representative of a station whose officers, directors, stockholders or proprietors hold any securities of the network organization, and the exact extent of such holdings;

18. Name of any national advertising agency, user, or national representative of a station, the securities of which are held by the network, its officers, directors, or proprietors;

19. Any relationship that may exist between the network and any national advertising agency, user, or national representative of a station through officers, directors, proprietors, employees, or security holders in common, and the exact nature and extent of such relationship;

20. Extent of program duplication in the primary and secondary service areas of stations carrying the network programs, particularly the percentage of population in the primary service area of each network station which may receive a network program as primary service from such station and from other network stations, the percentage of secondary service area of each network station which receives a network program as secondary service from such station and from other network stations, the number and extent

of such duplications and amount of duplication required for adequate service on chain programs. The primary and secondary service areas shall be considered as defined in the Commission's proposed Rules and Regulations governing standard broadcast stations and Standards of Good Engineering Practices concerning the same.

[fol. 56] EXHIBIT "F" TO COMPLAINT

Procedure for Oral Argument on Network Inquiry Report

Federal Communications Commission,
Washington, D. C., November 28, 1940.

The Federal Communications Commission today announced procedure for the oral argument on the committee network inquiry report made public June 12, 1940.

The hearing is scheduled for Monday and Tuesday, December 2 and 3, in hearing room A, Interstate Commerce Commission Building, starting at 10:30 a. m.

Each party will be allowed a maximum of 1 hour of argument on the issues of fact and policy raised in the committee report. The order of argument will be as follows: National Broadcasting Co.; Columbia Broadcasting System; Independent Radio Network Affiliates, Inc.; Don Lee Broadcasting System; Mutual Broadcasting System; Roy L. Albertson (WBNY); Rock Island Broadcasting Co. (WHBF); Voice of Longview (KFRO); World Broadcasting System, Inc.; Association of Radio Transcription Producers of Hollywood, Inc.; American Federation of Musicians; Independent Artists' Representatives; Associated Music Publishers, Inc.

In order to facilitate the oral argument, counsel are requested to consider the advisability and effect of the promulgation by the Commission of the following special regulations with respect to chain broadcasting. In several instances these suggestions are in the alternative, and the Commission desires to hear argument on the advisability and effect of alternative suggestions. It is to be understood that the regulations have not received the approval of the Commission, and are to be taken as suggestions by the Commission intended to focus the attention of counsel upon the issues raised in the report. It should also be under-

[fol. 57] stood that counsel are not in any way limited to a discussion of these regulations but may address themselves to any of the issues of fact or policy raised by the report of the chain broadcasting committee.

1-A. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which provides for or has the effect of establishing an exclusive affiliation with the network organization.

or

1-B. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which provides for or has the effect of establishing an exclusive affiliation with the network organization; *Provided*, That such restriction shall not apply to licensees of stations located in or rendering primary service to cities receiving adequate primary service from five or more full-time stations.

2. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with any network organization which gives the network organization an option on the hours of operation of the licensee's station for the broadcasting of commercial programs (a) for more than 30 percent of the converted hours of operation in any city receiving adequate primary service from three full-time stations with comparable facilities; (b) for more than 20 percent of the converted hours of operation in any city receiving adequate primary service from two full-time stations with comparable facilities; (c) for more than 10 percent of the converted hours of operation in any city receiving adequate primary service from one full-time station; (d) for a total number of converted hours exceeding by more than 25 percent the converted hours during which such licensee has broadcast commercial [fol. 58] programs transmitted to the licensee by the network organization during the 6 months preceding the effective date of the contract.

3-A. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with any network organization, the terms of which exceed in duration the effective period of the license granted by this Commission. For the purposes of this section, an

agreement shall be considered as exceeding in duration the effective period of the license if the agreement gives either party an option to extend the contract beyond the termination of the license; *Provided,* That this restriction shall not be construed as preventing a licensee from entering into a contract with a network organization a reasonable period of time, not to exceed 30 days, in advance of the expiration date of the existing contract.

or

3-B. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which gives the network organization any rights with respect to the renewal or cancellation of such contractual arrangement not given to the licensee.

or

3-C. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization for a period longer than 2 years.

4. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which controls, restrains, limits, or in any other way interferes with the establishment of the rates to be charged by the licensee for the sale of available broadcast time to advertisers or other clients.

[fol. 59] 5. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which has the effect of or will result in the broadcasting of the programs of one network company by two or more standard broadcast stations rendering adequate primary service to the same city.

6-A. After January 1, 1942, no licensee of a standard broadcast station shall, directly or indirectly, own or be owned by, or be under common control with or have any interests in a chain or network organization; *Provided,* That the Commission will grant reasonable extensions of time in the event that the licensee is unable to meet the requirements of this restriction before its effective date.

or

6-B. No person engaged in network broadcasting shall be licensed to operate more than two clear channel stations or more than three standard broadcast stations of all classes.

or

6-C. No person engaged in network broadcasting shall be licensed to operate any standard broadcast station located in a city receiving adequate primary service from less than five full time standard broadcast stations.

7. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, which prevents the licensee from rejecting, for reasonable cause, any program offered by the network organization. The contracts between the station licensees and network organizations shall expressly guarantee the right of program rejection by the licensee, and the judgment of such licensee shall be prima facie evidence of the reasonableness of rejection claims.

[fol. 60] In United States District Court, Southern District of New York

[Title omitted]

Order Amending Complaint—Filed January 28, 1942

Plaintiff having moved for an order that the complaint herein be deemed to be amended, for all purposes including plaintiff's motion for a temporary injunction and defendants' motion to dismiss the complaint or for summary judgment, in the respects set forth in the Notice of Motion dated January 5, 1942; said motion having regularly come on to be heard before this Court on January 12, 1942, at the hearing of plaintiff's motion for a temporary injunction and of defendants' motion to dismiss the complaint or for summary judgment;

Now, on reading and filing the Notice of Motion dated January 5, 1942, with proof of service thereof in support of the motion and the Court having heard John J. Burns, attorney for plaintiff, by Charles E. Hughes, Jr., of coun-

sel, in support of the motion, and there being no opposition to the granting thereof if granted upon condition that defendants' motion to dismiss the complaint or for summary judgment be deemed made against the complaint as amended, and due deliberation having been had, it is

Ordered, that plaintiff's said motion be and the same hereby is granted; and that the complaint in this action be amended in the following respects:

[fol. 61] (a) By inserting on page 5 thereof, immediately after the first sentence of paragraph Fourth, the following:

"The stations included in plaintiff's network comprise 115 standard broadcast stations which are independently owned, 7 standard broadcast stations owned and operated by plaintiff and designated and known as Stations WABC, New York, WJSV, Washington, D. C., WBBM, Chicago, KMOX, St. Louis, WCCO, Minneapolis, KNX, Los Angeles, and WBT, Charlotte, N. C.; and one standard broadcast station designated and known as WEEI, Boston, which plaintiff leases and operates."

(b) By inserting on page 7 thereof, immediately after the first sentence of paragraph Seventh, the following:

"The report was designated 'Report on Chain Broadcasting—Federal Communications Commission—Commission Order No. 37, Docket No. 5060, May 1941.' "

(c) By inserting on page 7 thereof, in the tenth line of paragraph Seventh, immediately after the words "a copy of the" the words "report and".

(d) By inserting on page 9 thereof, in paragraph Seventh, immediately after Rule 3.105 therein set forth, the following:

"3.106. No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control [2] with a network organization,

---

"[2] The word 'control' as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks."

for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing."

(e) By inserting on page 10 thereof, at the conclusion of paragraph Seventh, immediately after the sentence ending with the word "broadcasting" on the second line of said page, the following:

[fols. 62-63] "The purpose, terms and effect of Rule 3.106 as construed by the Commission in its report (Exhibit B) are to require plaintiff to dispose of its Station WBT in Charlotte, N. C.; to raise serious doubts whether plaintiff will be permitted to continue its ownership of Stations WCCO in Minneapolis and WJSV in Washington; and to require plaintiff to dispose of its stations in any other locality where the Commission finds the existing standard broadcast stations to be so few or of such unequal desirability (in terms of coverage, power, frequency or other related matters) that competition would be substantially restrained by the licensing of plaintiff's stations."

(f) By inserting on page 14 thereof, at the end of paragraph Thirteenth, immediately after the words "Amendment V thereto", the following:

"and because it constitutes an abridgement of the freedom of speech and of the press contrary to Amendment I thereto."

and it is further

Ordered, that defendants' motion to dismiss the complaint or for summary judgment be deemed made against the complaint as so amended.

Dated, New York, N. Y. January 27th, 1942.

(Sgd.) Leonard Hand, U. S. C. J.; Henry W. Goddard, U. S. D. J.; John Bright, U. S. D. J.

No. 64-223 EXHIBIT MBT-10 AMENDED COMPLAINT

REPORT

ON

CHAIN BROADCASTING



FEDERAL
COMMUNICATIONS
COMMISSION

COMMISSION ORDER No. 37 • DOCKET No. 5060

MAY 1941

REPORT

51

ON

CHAIN BROADCASTING



FEDERAL COMMUNICATIONS COMMISSION

COMMISSION ORDER No. 37 • DOCKET No. 5060

MAY 1941

FEDERAL COMMUNICATIONS COMMISSION

JAMES LAWRENCE FLY, *Chairman*
PAUL A. WALKER
NORMAN S. CASE
T. A. M. CRAVEN
GEORGE HENRY PAYNE
FREDERICK L. THOMPSON
[illegible] C. WAKEFIELD

For sale by the Superintendent of Documents, Washington, D. C.

TABLE OF CONTENTS

	Page
Introduction	1
A. History of proceedings	1
B. Scope of this report	2
C. Nature and significance of chain broadcasting	3
I. Early History of Network Broadcasting (1923–26)	5
A. The A. T. & T. network	5
B. The RCA network	6
C. Sale of WEAF and the Telephone Company network to RCA	7
D. Formation of the National Broadcasting Company	8
II. The Radio Corporation of America and the National Broadcasting Company	9
A. History and activities of RCA	9
1. Communications activities of RCA	11
2. RCA's radio manufacturing and selling activities	11
3. RCA's interest in the motion-picture industry	13
4. RCA's phonograph and recording business	14
B. The National Broadcasting Co	14
1. Increase in number of NBC outlets	15
2. Stations owned or controlled by NBC	15
3. Increase in business and income of NBC	16
4. NBC artists' bureau and concert service	17
5. Transcription business of NBC	17
C. Summary of RCA's scope of operations	18
III. The Columbia Broadcasting System	21
A. Formation and early history	21
B. Growth of CBS network	23
C. Management of artists by CBS	24
D. CBS' phonograph and transcription business	25
IV. The Mutual Broadcasting System	26
A. Formation of Mutual	26
B. Development of the Mutual network	27
V. Regional Networks	29
VI. Scope and Manner of Operation of the Nation-Wide Networks	30
A. Predominance of NBC and CBS in the broadcasting field	30
1. Stations affiliated with NBC and CBS	30
2. Ownership of stations by NBC and CBS	32
3. Proportion of broadcasting business handled by NBC and CBS	32
4. Payments to stations affiliated with NBC and CBS	32
5. Proportion of industry income received by NBC and CBS	33
6. Income and investment of NBC and CBS	33
7. Disposition of NBC and CBS profits	33
B. Contractual arrangements between national networks and affiliates	34
1. Length of affiliation contracts	35
2. Exclusivity	35
3. Time options	36
4. Rejection of network commercial programs	38
5. Sustaining programs	39
6. Station compensation	40
7. Network control over station rates	43
C. NBC's two networks—Red and Blue	44

Page

VII. The Effect of Network-Affiliate Relations on Competition in the Radiobroadcast Industry 46
A. Exclusive affiliation 51
1. Licensee allowed to broadcast programs of only one network 51
2. Network allowed to send programs to only one station 57
B. Long-term affiliation contracts 59
C. Network optional time 62
D. Rejection of network programs 65
E. Network ownership and operation of stations 66
F. NBC's Red and Blue networks 70
G. Limitation of competition between network and outlet 73
H. Interrelations among network practices 75
I. Status of network-stations relationships under these regulations 77
J. Application of regulations to regional networks 77
VIII. Jurisdiction 80
A. Jurisdiction under the commission's licensing power 80
1. The power to deny applications 80
2. The power to issue rules and regulations 85
B. Jurisdiction under the commission's power to make special regulations respecting chain broadcasting 85
IX. Conclusion 88
Order Containing Regulations 91
Appendices 93
A. Order instituting chain broadcasting investigation 95
B. Memorandum of submittal and conclusion of chain broadcasting committee report 97
C. Procedure for oral argument on network inquiry report 101
D. Regional networks 103
Additional views of Commissioners T. A. M. Craven and Norman S. Case 111

FEDERAL COMMUNICATIONS COMMISSION

REPORT ON CHAIN BROADCASTING

[Pursuant to Commission Order No. 37]

Docket No. 5060

By the Commission (Chairman Fly, Commissioners Walker, Payne, Thompson and Wakefield; Commissioners Case and Craven dissenting).

(VI)

INTRODUCTION

A. HISTORY OF PROCEEDINGS

The Federal Communications Commission on March 18, 1938, by Order No. 37,[1] authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity." On April 6, 1938, a committee of three Commissioners [2] was appointed by the Commission to supervise the investigation, to hold hearings in connection therewith, and "to make reports to the Commission with recommendations for action by the Commission." [3]

The Commission's order authorizing the investigation covered the following matters, among others: The contractual rights and obligations of stations engaged in chain broadcasting under network agreements; the extent of control over programs and advertising contracts exercised in practice by stations engaged in chain broadcasting; duplication of network programs in the same areas; exclusive contracts restricting stations to one chain service and chain services to one station in a given area; the extent to which single chains have exclusive coverage in particular areas; the policies of networks with respect to character of programs, diversification, and accommodation to the requirements of areas served; the number of stations licensed to or affiliated with each network and the amount of station time controlled and used by networks; rights and obligations of stations in relation to advertisers having network contracts; the nature of the service rendered by stations licensed to networks; competitive practices of stations engaged in chain broadcasting; the effect of chain broadcasting upon stations not engaged in chain broadcasting; practices or agreements in restraint of trade or in furtherance of monopoly in connection with chain broadcasting; and the extent and effect of concentration of control of stations locally, regionally, or nationally, through contracts, common ownership, or by other means.

Between November 14, 1938, and May 19, 1939, the committee held hearings pursuant to public notice that the Commission would hear any person or organization desiring to present evidence on the matters included for investigation in Commission Order No. 37. The committee requested the national networks, regional networks, station licensees, and transcription and recording companies to present evidence. It also requested information by questionnaire from licensees of stations and from holders of stock in licensee corporations. In addition, persons and organizations requesting an opportunity to present evidence material to the investigation were given an opportunity to be heard. On June 12, 1940, the committee issued its report [4]

[1] Order No. 37 is attached to this report as Appendix A.
[2] The then chairman, Mr. McNinch, was made an ex-officio member of the committee. Chairman Fly did not take his place as an ex-officio member.
[3] See F. C. C. Release No. 26434, April 6, 1938.
[4] Hereinafter referred to as the committee report. The committee's memorandum of submittal and chapter VI of the committee report containing its conclusions and recommendations, are attached hereto as Appendix B.

based upon the evidence adduced at the hearings and the official records of the Commission.

In November 1940 briefs in this proceeding were filed on behalf of the national networks and other interested parties. On December 2 and 3, 1940, oral arguments before the full Commission were presented by the parties. These arguments were directed to the committee report and to certain draft regulations issued solely for the purpose of giving scope and direction to the oral arguments.[5] On January 2, 1941, supplementary briefs were filed on behalf of the three national network organizations in which were discussed the jurisdiction of this Commission with respect to matters covered by the committee report and the draft regulations, and in which attention was given to the actual and feasible limits of competition in the broadcasting field, with particular reference to network broadcasting.

B. SCOPE OF THIS REPORT

While the investigation as prescribed by Order No. 37 was not limited to chain broadcasting,[6] network operations were the principal subject of inquiry.[7] The great bulk of the testimony at the hearings dealt with network matters, and the committee report deals largely with these matters. The committee's memorandum submitting its report, however, directed our attention to two other problems.

The first of these is the ownership of more than one station by a single individual or corporation.[8] The Commission has had and still has frequent occasion to deal with this question in its administration of the station licensing provisions of the Communications Act. In the rules recently promulgated for frequency modulation (FM) and for television, we have established rules restricting multiple ownership of stations furnishing these new broadcast services.[9] Although the rules covering standard broadcast service do not contain comparable provisions, the Commission is working out a policy in its day-to-day decisions.[10]

The other nonnetwork matter to which the committee directed our attention is the problem created by the fact that the stock of some corporate licensees is listed on stock exchanges. This problem relates not only to the administration of section 310 (b) of the Communications Act governing the transfer or assignment of radio stations, but also to the enforcement of section 310 (a), prohibiting alien ownership or control of radio stations beyond certain limits. A number of stations are owned or controlled by large corporations whose stock is listed on stock exchanges and is widely held. The Commission is giving careful consideration to the problem in order to insure observance of section 310.

The committee did not make specific recommendations with respect to either of these two matters, but indicated that the Commission

---

[5] A copy of the release of the Commission containing the draft regulations is attached to this report as Appendix C.

[6] The investigation was ordered "to determine what special regulations applicable to radio stations engaged in chain *or other* broadcasting are required in the public interest, convenience, or necessity * * *."

[7] Of the 13 specific matters for investigation listed in the order, all but one (No. 13) relate directly to chain broadcasting.

[8] The general question of multiple ownership of radio stations should not be confused with network ownership of stations which is treated at length in chs. VI and VII.

[9] See rule 3.230 (multiple ownership of high-frequency stations) and rule 4.226 (multiple ownership of television stations).

[10] See, *e. g., In the Matter of South Bend Tribune*, March 1, 1941, File No. B4-P-900.

should give consideration to them in the light of administrative experience and should suggest to Congress the enactment of amendatory legislation, if later found to be necessary. In this report we do not attempt to solve these difficult questions. They are receiving continuing attention in our administration of the provisions of the Communications Act and may, indeed, warrant further special study.[11]

Accordingly, this report is devoted largely to the chain broadcasting matters with which the committee report is primarily concerned. The views expressed and the regulations adopted herein are, we believe, fully supported by the evidence adduced at the hearings by the networks and other interested parties. With respect to such matters as the present allocation and ownership of particular broadcasting facilities, we have utilized our current official records. The historical data in the early chapters includes matters of common knowledge or of public record. In a proceeding of this character, there is no reason to exclude such matters or records from consideration.

C. NATURE AND SIGNIFICANCE OF CHAIN BROADCASTING

Chain broadcasting is defined in section 3(p) of the Communications Act of 1934 as the "simultaneous broadcasting of an identical program by two or more connected stations." It is technically accomplished at present by transmitting the program by wire, usually leased telephone lines, from its point of origination to each of the outlet stations of the chain or network for simultaneous broadcasting. The outlets are in certain highly important cases owned by the networks themselves, but more commonly they are independently owned and are affiliated with the networks by means of a network affiliation contract.

There are at present three organizations operating four network systems of national scope, and a number of organizations operating network systems of a regional character. The largest and oldest national organization is the National Broadcasting Company, Inc.,[12] founded in 1926, a subsidiary of the Radio Corporation of America.[13] NBC operates two network systems, known as the "Red" and "Blue" networks. Second in size, and established a year after NBC, is the Columbia Broadcasting System, Inc.,[14] controlled by William S. Paley and associates. The third nation-wide system is the Mutual Broadcasting System, Inc.,[15] which was established in 1934 and which is largely controlled by the Chicago Tribune and R. H. Macy & Co.

The broadcast business handled by the three national network organizations (excluding the nonnetwork business of the stations owned by them) constitutes almost half of the total business of all commercial broadcast stations in the United States. In 1938[16] the network net time sales [17] of NBC, CBS, and Mutual totaled over $46,000,000, as com-

[11] Similarly, the appearance of network broadcasting in the frequency modulation (FM) field will merit careful study by the Commission. Early in April 1941 a proposed FM chain, The American Network Inc., was organized at a meeting of some 45 broadcast groups. The board included John Shepard III, of the Yankee Network, Boston, chairman; Walter J. Damm, WTMJ; Herbert L. Petty, WHN; Gordon Gray, WSJS; Harry Stone; WSM; and Jack Latham, manager, a former advertising and radar company executive. See *FM Bulletin*, April 9, 1941, pp. 1–2.

[12] Hereinafter referred to as NBC.

[13] Hereinafter referred to as RCA.

[14] Hereinafter referred to as CBS.

[15] Hereinafter referred to as Mutual.

[16] The most recent financial and other data put in evidence at the committee hearings was, for most part, for the year 1938.

[17] The term "network net time sales" means the amount received by the networks from the sale of time for network programs. The word "net" is used to indicate that discounts and agency commissions have been deducted.

pared with the net time sales of the entire industry in that year, amounting to about $101,000,000.

Network broadcasting has been an important factor in the development of the broadcasting industry. Many improvements which have taken place in engineering, in program quality, and in the broadcasting of special events of national interest to ever increasing audiences have been due, in considerable measure, to the advertising revenues brought to the radio broadcasting industry by the network method of broadcasting to Nation-wide audiences.

If radio broadcasting is to serve its full function in disseminating information, opinion, and entertainment, it must bring to the people of the nation a diversified program service. There must be, on the one hand, programs of local self-expression, whereby matters of local interest and benefit are brought to the communities served by broadcast stations. There must be, on the other hand, access to events of national and regional interest and to programs of a type which cannot be originated by local communities. Neither type of program service should be subordinated to the other.

The growth and development of chain broadcasting found its impetus in the desire to give widespread coverage to programs which otherwise would not be heard beyond the reception area of a single station. Chain broadcasting makes possible a wider reception for expensive entertainment and cultural programs and also for programs of national or regional significance which would otherwise have coverage only in the locality of origin. Furthermore, the access to greatly enlarged audiences made possible by chain broadcasting has been a strong incentive to advertisers to finance the production of expensive programs.

From an economic standpoint, the stations themselves are in a position to benefit greatly from their participation in chain broadcasting; such broadcasting can bring them a larger share of the money expended by advertisers for national or regional coverage. It is apparent that chain broadcasting plays an essential part in the development of the broadcast industry.

But the fact that the chain broadcasting method brings benefits and advantages to both the listening public and to broadcast station licensees does not mean that the prevailing practices and policies of the networks and their outlets are sound in all respects, or that they should not be altered. The Commission's duty under the Communications Act of 1934 is not only to see that the public receives the advantages and benefits of chain broadcasting, but also, so far as its powers enable it, to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated.

I. EARLY HISTORY OF NETWORK BROADCASTING (1923–26)

Network broadcasting is almost as old as broadcasting itself. The first network broadcast occurred in January 1923,[1] less than 3 years after the establishment of the first broadcasting stations.[2]

When broadcasting began, the stations were faced with the problem of deriving sufficient revenue from operations. There was considerable difference of opinion in the industry as to how this problem could be solved. Some believed that the manufacturers and distributors of radio receiving sets and parts should contribute to the cost of operating broadcasting stations as a service to the purchasers of sets and in order to stimulate sales. Others were of the opinion that broadcasting stations should be operated by the Government, or supported by endowment funds contributed by public-spirited citizens.[3] The genesis of the sponsored program occurred on August 28, 1922, when the first sale of radio station time for commercial purposes was made by the American Telephone & Telegraph Co.'s station WEAF at New York City.[4] The eventual success of the practice of selling radio time to advertisers, and the development of network broadcasting, are the foundation stones of the commercial structure of radio broadcasting today.

A. THE A. T. & T. NETWORK

Station WEAF was constructed in New York by the American Telephone & Telegraph Co. and was licensed on June 1, 1922. It was operated as a "toll" station, available for hire by those wishing to reach the public by radiotelephony.

At that time the Telephone Co. claimed the exclusive right, under certain patents and patent-licensing agreements, to sell radio time and operate "toll" stations.[5] This right was asserted under a cross-licensing agreement dated July 1, 1920, between the General Electric Co. and the Telephone Co. and an extension agreement of the same date under which RCA and Western Electric were added as parties. The Westinghouse Electric & Manufacturing Co. was brought within the purview of these agreements on June 30, 1921.[6] They gave the

---

[1] On January 4, 1923, a special circuit was set up between stations WEAF, New York City, and WNAC, Boston. A program originating at WEAF was then broadcast simultaneously by the two stations. See testimony of O. B. Hanson, NBC vice president and chief engineer, Transcript, p. 694: "Network Broadcasting," by Barrett and others, in *Bell Telephone Quarterly*, vol. 13, pp. 81–82 (April 1934).

[2] The first broadcast stations licensed for regular operation were WWJ at Detroit on October 13, 1921, and KDKA at Pittsburgh on November 7, 1921. On November 2, 1920, however, station KDKA broadcast, under a special license, the returns of the Harding-Cox election. See statement of M. H. Aylesworth in *Hearings on Confirmation of Federal Radio Commissioners*, before Senate Committee on Interstate Commerce, 70th Cong., 1st sess., February 4, 1928, p. 233.

[3] See *New York Times*, May 18, 1924, sec. VIII, p. 3, for collection of opinions.

[4] Hanson, Tr., p. 682.

[5] Hanson, Tr., 688; *Radio Broadcast*, June 1924, pp. 130–132.

[6] *Report of Federal Communications Commission on Investigation of the Telephone Industry in the United States*, 76th Cong., 1st sess., H. Doc. No. 340 (1939) (hereinafter cited as F. C. C. *Telephone Report*), pp. 225–226; *Report of Federal Trade Commission on the Radio Industry*, 67th Cong., 4th sess. (1923) (hereinafter cited as F. T. C. *Radio Report*), pp. 47–48.

Telephone Co. and its manufacturing subsidiary, the Western Electric Co., the sole rights to make, lease, and sell commercial radiotelephone transmitting equipment. This provision, the Telephone Co. insisted, gave it the exclusive right to sell time over a "toll" station. The assertion of these rights was a substantial factor in giving it a position of leadership during the early days of broadcasting.[7]

The Telephone Co. inaugurated network broadcasting on January 4, 1923, with a program broadcast simultaneous over station WEAF and a Boston station, WNAC, owned by John Shepard III.[8] The second network broadcast occurred on June 7, 1923, and involved, in addition to WEAF, stations WGY in Schenectady, KDKA in Pittsburgh, and KYW in Chicago.[9] The first continuous network broadcasting occurred during the summer of 1923, when for a period of 3 months station WEAF in New York programmed Col. Edward H. R. Green's station WMAF at South Dartmouth, Mass.[10] During the summer of 1923 the Telephone Co., through one of its subsidiary companies, constructed station WCAP in Washington, and thereafter WEAF and WCAP were frequently connected for network broadcasting.[11] These two stations became the nucleus of the network built up by the Telephone Co.

From 1924 to 1926, the Telephone Co.'s network expanded its operations rapidly. Early in 1924, the company produced the first transcontinental network broadcast, utilizing station KPO in San Francisco.[12] By the fall of 1924, the Telephone Co. was able to furnish a coast-to-coast network of 23 stations to broadcast a speech by President Coolidge.[13] At the end of 1925 there was a total of 26 stations on the regular Telephone Co. network, extending as far west as Kansas City (station KSD).[14] The company was selling time to advertisers over a basic network of 13 stations at $2,600 per hour,[15] and was deriving gross revenues at the rate of about $750,000 per year from the sale of time.[16]

B. THE RCA NETWORK

Meanwhile, RCA was making a start in network broadcasting. In the spring of 1923, RCA acquired sole control of station WJZ in New York City,[17] and later that year it constructed and started to operate station WRC at Washington. The first network broadcast by RCA occurred in December 1923, and involved only WJZ and the General Electric Co.'s station WGY at Schenectady, N. Y. The connection was made with Western Union telegraph wires.[18]

---

[7] The standard contract whereby the Telephone Co. sold transmitting equipment expressly provided that the purchaser was not to use the station for profit. *Radio Broadcast*, June 1924, pp. 130–132. It should be noted, however, that some independent stations operated in spite of the Telephone Co.'s claims. *Radio Broadcast*, June 1924, pp. 130–132. After April 18, 1924, some independent stations were licensed by the Telephone Co. to engage in "toll" broadcasting. Hanson, Tr. pp. 678 *et seq.*; F. C. C. *Telephone Report*, pp. 387–399.

[8] *Supra*, n. 1.

[9] Hanson, Tr., p. 698. Station WGY was owned by General Electric Co. and stations KDKA and KYW by the Westinghouse Electric & Manufacturing Co.

[10] *Id.*, p. 699.

[11] F. C. C. *Telephone Report*, p. 388. WCAP discontinued operations in 1926. *Infra*, n. 24.

[12] Hanson, Tr. p. 711.

[13] *New York Times*, October 24, 1924, p. 1.

[14] Hanson, Tr., p. 717.

[15] Archer, *History of Radio to 1926*, p. 361.

[16] Archer, *Big Business in Radio*, p. 246.

[17] Station WJZ had originally been jointly controlled by Westinghouse and RCA. *RCA Annual Report for 1922*, p. 20. Its studios were originally located in Newark, but were moved to New York in 1922.

[18] Hanson, Tr., p. 704.

Although there was keen rivalry between stations WEAF and WJZ during this period, the vigorous network competition which RCA might otherwise have offered was hampered because of two factors. In the first place, RCA was prevented from reaching numerous outlets and developing its network because of the Telephone Co.'s policy with respect to the use of its telephone lines by others for network purposes.[19] The telegraph wires which RCA was thus compelled to use were quite inferior for this purpose. Secondly, RCA was prevented from developing the business aspects of broadcasting and network broadcasting by its inability to sell time to advertisers; for the Telephone Co. claimed, under the cross-licensing agreement of July 1, 1920, the exclusive right to sell time for broadcasting purposes.[20] Hence RCA stations made no charge for the use of time.[21]

Largely because of these obstacles, the RCA network did not grow as rapidly as the Telephone Co.'s network. Thus, while the Telephone Co. was able, in March 1925, to broadcast President Coolidge's inauguration over a transcontinental network of 22 stations, the RCA network carried it only over WJZ, WBZ, WGY, and WRC.[22]

C. SALE OF WEAF AND THE TELEPHONE COMPANY NETWORK TO RCA

In 1926, the Telephone Co.'s direct participation in the broadcasting business, in which it had pioneered and attained a dominant position, came to an abrupt end. As part of a general readjustment of relations between the Telephone Co. and the so-called "Radio Group" (RCA, Westinghouse, and General Electric), the Telephone Co. withdrew from the broadcasting field, and transferred its properties and interests to the "Radio Group."

In May, 1926, the Telephone Co. had incorporated a subsidiary corporation, the Broadcasting Co. of America, to which were transferred WEAF and the network operations. On July 1, 1926, a contract was entered into, which became effective November 1, 1926, under which RCA purchased the assets of the Broadcasting Co. of America.[23] The purchase price was $1,000,000, and the transaction included WEAF and the entire broadcasting business of the Telephone Co. except the Washington station, WCAP, which was closed.[24] As a result of this sale, the way was cleared for the sale of broadcasting time by the "Radio Group." The Telephone Co. also agreed to withdraw from the broadcasting business and covenanted not to compete with RCA in this field for a period of 7 years, under penalty of repaying $800,000 of the $1,000,000 purchase price. The Telephone

---

[19] F. C. C. *Telephone Report*, pp. 389–392; Hanson, Tr., p. 687. The policy which the Telephone Co. In general, this policy was to decline to furnish this service to broadcast-stations for network broadcasting and to pick up programs originating outside station studios was designed to protect the broadcasting activities and the patent position of the Telephone Co. In general, this policy was to decline to furnish this service to broadcasting stations which were not licensed under the Telephone Co.'s patents and to limit in various ways wire service supplied to licensed stations. For a discussion of the broadcasting activities of the Telephone Co., see F. C. C. *Telephone Report*, pp. 387–399.

[20] *Supra*, p. 5.

[21] Archer, *op. cit. supra*, n. 15, p. 304.

[22] *New York Times*, March 5, 1925, p. 5.

[23] F. C. C. *Telephone Report*, pp. 392–395; *Report on Communication Companies*, 73d Cong., 2d sess., H. Rept. 1273 (1934) (hereinafter cited as *Report on Communication Companies*), pt. 3, p. 4074.

[24] WCAP, the Telephone Co.'s station in Washington, had been sharing time with WRC, the RCA station in Washington. Following consummation of the agreement, WCAP discontinued operation and WRC took over its operating time and programs. *New York Times*, July 28, 1926, p. 33.

Co. also agreed to make available its telephone lines to RCA for network purposes, and an understanding was reached that RCA would use only Telephone Co. lines, unless they were not available.[25]

D. FORMATION OF THE NATIONAL BROADCASTING COMPANY

On September 9, 1926, RCA formed a corporation, the National Broadcasting Co., to take over its network broadcasting business, including the properties being purchased from the Telephone Co.[26] In October 1926, RCA assigned to NBC its rights to purchase the Broadcasting Co. of America, and in November NBC paid the purchase price of $1,000,000, and took over the operation of WEAF and the old Telephone Co. network.[27]

The outstanding capital stock of NBC was owned by RCA, General Electric, and Westinghouse in the ratio of 50, 30, and 20 percent, respectively, from the date of incorporation to May 23, 1930. On that date RCA acquired the NBC stock previously owned by General Electric and Westinghouse.[28] Thus NBC became a wholly owned subsidiary of RCA.

The sale of station WEAF to NBC and the withdrawal of the Telephone Co. from the broadcasting business marked the end of an era. The pioneer stage of network broadcasting was drawing to a close. The Telephone Co. had been well on its way toward financial success in the operation of WEAF as a "toll" station. The technical and social practicability of network broadcasting had been clearly shown as early as March 4, 1925, when the Telephone Co.'s 22-station network carried the inaugural address of President Coolidge to an audience estimated at 18,000,000 listeners.[29]

RCA could not fail to assume a dominant position in the field of network broadcasting as a result of its purchase of WEAF and the Telephone Co. network. Following the purchase, the only two networks in the country were under the control of RCA. The purchase has had a lasting effect on the structure of network broadcasting; for NBC's present operation of two networks—the "Red" and the "Blue"—stems from its ownership of both WEAF and WJZ in New York City, and from its acquisition of the Telephone Co.'s network organization in addition to RCA's original network system based on WJZ. For some time after the purchase, RCA had a practical monopoly of network broadcasting, and NBC is still by far the largest network organization.

---

[25] F. C. C. *Telephone Report*, p. 394; Hanson, Tr., p. 855.
[26] *Report on Communication Companies*, pt. 3, p. 1048.
[27] F. C. C. *Telephone Report*, p. 393.
[28] *Report on Communication Companies*, pt. 3, p. 4080.
[29] *New York Times*, March 5, 1925, p. 5. It was also estimated that about 4,800,000 persons heard the broadcast over the RCA network of four stations, WJZ, WBZ, WRC, and WGY.

II. THE RADIO CORPORATION OF AMERICA AND THE NATIONAL BROADCASTING COMPANY

In examining the history and structure of the largest national network organization—NBC—it is essential to bear in mind that it is a wholly owned subsidiary of the Radio Corporation of America. NBC is but a branch—though an important branch—of a vast corporate enterprise which straddles the fields of communications, radio-equipment manufacturing, and entertainment. The position of NBC in the field of broadcasting cannot be fully understood nor properly evaluated without some grasp of the history and activities of RCA.

A. HISTORY AND ACTIVITIES OF RCA

The Radio Corporation of America was incorporated in Delaware on October 17, 1919,[1] a full year before the dawn of radio broadcasting. At that time the business of wireless was primarily point-to-point and ship-to-shore communication for the transmission of messages, and the determination of location and direction by means of the radio compass. Substantially all commercial wireless communication in the United States was then carried on by the Marconi Wireless Telegraph Co. of America (American Marconi Co.) which was controlled by Marconi's Wireless Telegraph Co., Ltd. (British Marconi Co.).[2] A number of American-controlled companies, however, were carrying on research in the radio field, manufacturing radio apparatus, and holding important radio patents. Among these were the General Electric Co., the Westinghouse Electric and Manufacturing Co., and the Western Electric Co., the manufacturing subsidiary of the American Telephone & Telegraph Co.[3]

The patent situation had become an obstacle to the development of radio, for each manufacturer needed patented devices controlled by others. Since there was no general cross-licensing of patents among the manufacturers, each company was vulnerable to patent infringement suits. The taking over of all wireless stations by the Government after the declaration of war in April 1917 radically altered the patent situation. Under its war-time control the Government was able to combine the patents and scientific resources of all electrical manufacturers. Thus manufacturers producing apparatus for the Government could use the patents and inventions of others indiscriminately without remuneration to the owners of patents, whose only redress was the filing of claims for damages against the United States in the Court of Claims. As a result of combining various patented inventions, new devices were developed out of which came practical radiotelephone transmitters satisfactory for war-time

[1] *Report on Communication Companies*, pt. 3, p. 4114.
[2] *Id.*, pp. 999–991; F. T. C. *Radio Report*, p. 12.
[3] F. T. C. *Radio Report*, pp. 2, 13–18.

purposes.[4] This intermingling of patents worked well as long as the industry was on a war-time basis under Government control, and while claims for patent infringement were being subordinated to the urgent necessity of developing and maintaining an efficient communications system. But it was anticipated that much confusion in the patent field would result upon the return of the wireless stations to their owners.[5]

The creation of RCA was related both to the patent tangle, and to a desire that American radio-communications should not be under foreign control. In the spring of 1919, the General Electric Co. had been negotiating for the sale to the British Marconi interests of exclusive rights in the Alexanderson alternator, a patented device which at that time was considered of critical importance in long-distance radio transmission.[6] Rear Admiral W. H. G. Bullard, then Director of Naval Communications, opposed the transfer of this device to foreign control. Instead of selling these rights, General Electric evolved a comprehensive plan under which the British stock interest in the American Marconi Co. would be purchased, and a new corporation formed which would take over the business of the American Marconi Co., and use and license others to use the patents held by General Electric, the American Marconi Co., and other companies. In pursuance of this plan, RCA was formed; in November 1919 it absorbed the American Marconi Co. and entered into a cross-licensing agreement with the General Electric Co., which acquired a large block of RCA stock.[6] When Federal operation of radio stations terminated, RCA embarked upon the activities which were to make it the leading American radio-communications company.

In 1920 and 1921 additional cross-licensing agreements were concluded which involved, in addition to General Electric and RCA, the Telephone Co. (including its manufacturing subsidiary, the Western Electric Co.) and Westinghouse.[7] As a result of these agreements: (1) General Electric and Westinghouse obtained the exclusive right to manufacture radio receiving sets; (2) RCA obtained the exclusive right to *sell* radio receiving sets, which were to be purchased by RCA from General Electric and Westinghouse in the proportion of 60 and 40 percent; (3) the Telephone Co. was granted the exclusive right to make, lease, and sell broadcasting transmitters.[8]

---

[4] As early as 1915, the Government, in conjunction with the Telephone Co., had carried on experiments in the field of radiotelephony. During that year, messages were sent from the naval station at Arlington, Va., and from Washington to such distant points as San Francisco, Honolulu, and Paris. In 1916, radiotelephony was used in transmitting messages to a naval destroyer 550 miles at sea, to airplanes in flight, and to submarine chasers. A climactic event in the history of radiotelephony occurred in 1919 when the Secretary of the Navy in Washington conversed by this method with the President of the United States, 1,000 miles at sea. "Rise of the Wireless Telephone," *Current History*, May 1920, pp. 265–269; "Wireless Telephony," by N. H. Slaughter, *Annual Report of Smithsonian Institution, 1919*, pp. 180–182; "Radio Telephony," by E. H. Colpitts, in *Journal of the Society of Automotive Engineers*, September 1919, pp. 215, 216; Report of Director of Naval Communications in Report of the Secretary of the Navy, Miscellaneous Reports (1916), pp. 146–147; see also *New York Times*, October 23, 1914, p. 79; January 27, 1915, p. 1; September 30, 1915, p. 1; October 1, 1915, pp. 1, 3; November 6, 1915, p. 4; May 7, 1916, sec. I, p. 6; May 8, 1916, p. 17.

[5] *Ibid.*; see also Archer, *History of Radio to 1926*, pp. 137–141, 188.

[6] F. T. C. *Radio Report*, pp. 15–22, 39–43; statement of O. F. Schuette in *Hearings on H. R. 8825*, 70th Cong., 1st sess., before House Committee on Merchant Marine and Fisheries (1928), pp. 277–278.

[7] *Supra*, pp. 5–6; F. T. C. *Radio Report*, pp. 44–49.

[8] These agreements were revised in 1926. It should be noted, however, that although these agreements purported to confer exclusive rights, they were binding only on the parties. With respect to persons not parties to the agreements, the exclusive nature of the rights exchanged depended upon the validity and scope of the patents upon which they were based. And, in fact, some manufacturers made and sold broadcast transmitters and receivers without regard to those patents.

In connection with all these agreements, General Electric, Westinghouse, and the Telephone Co. obtained substantial stock interests in RCA.[9] The Telephone Co. had disposed of its RCA stock by January 18, 1923, but Westinghouse and the General Electric Co. did not divest themselves of their interest in R. C. A. until after 1932, when a consent decree was entered as a result of an antitrust action brought by the Department of Justice.[10]

1. Communications activities of RCA

As may be seen from the foregoing account, RCA was formed before the days of broadcasting, primarily for the purpose of carrying on communications activities. Its operations during the first 2 years of its existence may be summarized as follows: Supplying radio apparatus to ships; maintaining radio communication between ships and from ship to shore; furnishing transoceanic point-to-point radio communication service; and selling the parts used by amateurs and experimenters in assembling radio sets.[11]

During 1921, RCA's gross income from its transoceanic communications activity amounted to $2,138,626.[12] The volume of this business thereafter increased, but rather conservatively. In 1929 RCA formed a subsidiary corporation—R. C. A. Communications, Inc.—to carry on its international and domestic point-to-point radio communications business. From 1929 to 1932 the revenues of this subsidiary averaged about $4,250,000 per year.[13]

At the end of 1927, RCA's marine radio business was also turned over to a new wholly owned subsidiary, the Radiomarine Corporation of America. Radiomarine took over ship-to-shore and ship-to-ship communication, the installation of radio apparatus on shipboard, and the operation of coastal stations that communicate with ships.[14]

2. RCA's radio manufacturing and selling activities

As set forth above, under the 1920 cross-licensing agreements RCA became the sole sales agent for radio receiving sets manufactured by General Electric and Westinghouse.[15] The development

[9] The following table, based upon data in the F. T. C. *Radio Report*, p. 20, indicates the distribution of RCA stock outstanding in 1922:

Name of stockholder	Common stock	Preferred stock	Percent of total voting stock [1]
General Electric	1,876,000	620,800	25.8
Westinghouse	1,000,000	1,000,000	20.6
American Telephone & Telegraph Co.		400,000	4.1
United Fruit Co.	160,000	200,000	3.7
Others [2]	2,698,194	1,735,174	45.8
Total	5,734,194	3,955,974	100.0

[1] Both common and preferred shares had equal voting power, share for share. *Moody's Manual of Railroads and Corporation Securities—Public Utilities* (1920), p. 2246.
[2] Most of these were former stockholders of the Marconi Co. of America. *Report on Communication Companies*, pt. 3, p. 1003.

[10] *Report on Communication Companies*, pt. 3, pp. 1003-1004. For terms of consent decree, see *Hearings on H. R. 4523, Before House Committee on Patents*, 74th Cong., 1st sess. (1935), pp. 229-233.
[11] F. T. C. *Radio Repo. t*, p. 33.
[12] *Id.*, p. 37.
[13] *Report on Communication Companies*, pt. 3, pp. 4186, 4194.
[14] *Id.*, pt. 1, p. 115, and pt. 3, p. 4173.
[15] *Supra*, p. 10.

of broadcasting caused the demand for these sets to grow by leaps and bounds. During 1921, RCA's gross sales were only $1,468,920, or about two-thirds as much as its total revenues from transoceanic communication. The next year the gross sales had increased to $11,286,489, or nearly four times that year's total revenues from transoceanic communication.[16] By 1924, gross sales totaled about $50,000,000.[17] In September 1926, RCA announced that it was the largest distributor of radio receiving sets in the world.[18] Thereafter RCA granted licenses to a number of radio set manufacturers,[19] but continued as one of the outstanding sellers of receiving sets.

In 1930 RCA spread into the manufacturing of receiving sets. In that year RCA acquired the right to manufacture as well as sell radio receivers, by virtue of an agreement between RCA, General Electric, and Westinghouse.[20] It occupies a leading position in that field today.

In connection with the sale of station WEAF and the Telephone Co. network to RCA in 1926, a new cross-licensing agreement was executed whereby the Telephone Co. granted to the Radio Group the nonexclusive right to manufacture, lease, and sell broadcast transmitting equipment, thus relinquishing its claim to the exclusive right with respect to such equipment which it had asserted under the 1920 agreement.[21] Within the Radio Group, RCA's early role with respect to broadcast transmitting equipment was that of sales agent. Under the new agreements entered into pursuant to the 1932 consent decree, RCA acquired the right to manufacture as well as sell such apparatus.[22] Since that time RCA has been a leading manufacturer in this field.

RCA is also prominent in other phases of radio manufacturing and selling. Until the expiration of an important patent in November 1922, RCA controlled the manufacture, sale, and use of all forms of radio tubes, and it has retained a substantial portion of the business since that time.[23]

For about the first decade of its corporate existence RCA carried on substantially all its manufacturing and selling activities under its own name. On December 26, 1929, RCA Radiotron Co., Inc. was incorporated by RCA to engage in the manufacture and sale of radio tubes.[24]

At the same time RCA Victor Co., Inc. was incorporated by RCA to take over the assets and business of the Victor Talking Machine Co. with respect to phonographs and records, and the manufacturing and sales rights of RCA with respect to radio apparatus.[25] On

---

[16] F. T. C. *Radio Report*, p. 37.
[17] *RCA Annual Report for 1924*, p. 14.
[18] See the statement of David Sarnoff, chairman of the board of directors of NBC and president of RCA. Tr., p. 29.
[19] *Radio Broadcast*, June 1929, p. 78.
[20] *Moody's Manual of Investments—Industrials* (1931), p. 2277.
[21] F. C. C. *Telephone Report*, p. 399.
[22] *Report on Communication Companies*, pt. 1, pp. 118, 224.
[23] F. T. C. *Radio Report*, p. 76. Even after the expiration of this patent, RCA was able to retain at least half of the total radio tube business for almost 10 years. *Radio Broadcast*, April 1929, p. 379. One of the methods through which RCA was able to maintain its position was a standard clause in its contracts with radio set manufacturers licensed under RCA patents, the effect of which was to require RCA licensees to use RCA tubes in their receivers. This clause was held to be in violation of sec. 3 of the Clayton Act (*Lord v. Radio Corporation of America*, 24 F. (2d) 565 (D. Del. 1928), *aff.* 28 F. (2d) 257 (C. C. A. 3, 1928), *cert. den.*, 278 U. S. 648 (1928); 35 F. (2d) 962 (D. Del., 1929), *aff.* 47 F. (2d) 606 (C. C. A. 3, 1931), *cert. den.*, 283 U. S. 847 (1931)), and the percentage of the radio tube business controlled by RCA has since declined.
[24] *Report on Communication Companies*, pt. 1, p. 115.
[25] *Ibid.*, and *infra*, p. 14.

January 1, 1932, RCA transferred its investment in RCA Photophone, Inc., to RCA Victor Co., Inc.[26] In January 1935 RCA Radiotron Co., Inc., and RCA Victor Co., Inc., were merged into a new company called RCA Manufacturing Co., Inc.,[27] which has become the manufacturing subsidiary of the RCA system. In addition to radio receiving sets, transmitters, and tubes, phonographs and records, RCA Manufacturing Co. now makes transcriptions, sound equipment for both motion-picture studios and theaters, and public-address systems, as well as motion picture and radio equipment for amateurs, electron microscopes, electronic pianos, television transmitters and receivers, radio compasses, communications equipment, and a variety of other products.

3. RCA's interest in the motion-picture industry

In the fall of 1927, RCA acquired a foothold in the motion-picture industry by the purchase of blocks of stock in Film Booking Office (FBO), which operated studios for the production of motion pictures.[28] In April 1928 RCA Photophone, Inc., was organized by the Radio Group to develop apparatus for synchronizing motion pictures with sound,[29] and it entered into competition with Electrical Research Products, Inc., a subsidiary of Western Electric, which had already occupied a large segment of this field.[30]

On October 25, 1928, Radio-Keith-Orpheum Corporation (RKO) was formed by a merger of FBO and Keith-Albee-Orpheum Corporation (KAO), a company operating vaudeville and motion-picture theaters, and stock in RKO was issued in exchange for outstanding shares of KAO and FBO.[31] There were two classes of RKO stock, having equal voting rights: Class A with 3,500,000 shares authorized and 1,212,992 issued, and class B with 500,000 shares authorized and issued. All of the class B stock was issued to RCA. RCA Photophone, Inc., then granted to RKO and its subsidiaries engaged in the production of motion pictures a non-exclusive license for the use of its sound-recording equipment.[32]

RKO also obtained direct and indirect interests in approximately 150 companies engaged primarily in operating theaters in cities through the United States and Canada and in producing motion pictures and distributing them throughout the world.[33] The theaters in which RKO had an interest also furnished a market for the sound-reproducing equipment manufactured by RCA Photophone, Inc.[34]

In 1930 RCA held approximately 25 percent, and in 1932 approximately 64 percent, of the outstanding stock of RKO.[35] In 1935 RCA sold one-half of its holdings in RKO to the Atlas Corporation for $5,000,000 cash and gave an option on the remainder at $6,000,000, which was to remain in effect until December 31, 1937.[36] In 1936 this

---

[26] *Id.*, pt. 3, p. 4233.
[27] *RCA Annual Report for 1934*, p. 6.
[28] *Poor's Industrials* (1929), p. 2902; *New York Times*, January 5, 1928, p. 33.
[29] *Moody's Manual of Investments—Industrials* (1930), p. 582; RCA Photophone, Inc., was originally owned by RCA, General Electric, and Westinghouse in the ratios of 60, 24, and 16 percent, respectively. In 1930, however, RCA acquired the entire stock interest in RCA Photophone, Inc. Archer, *Big Business and Radio*, p. 331.
[30] F. C. C. *Telephone Report*, pp. 401–415.
[31] *RCA Annual Report for 1928*, p. 7; *Poor's Industrials* (1929), p. 2906.
[32] *Poor's Industrials* (1929), pp. 2906–2907.
[33] *Report on Communication Companies*, pt. 1, p. 116, and pt. 3, p. 4142.
[34] *Moody's Manual of Investments—Industrials* (1931), p. 2278.
[35] *RCA Annual Report for 1930*, p. 23; *for 1932*, p. 4; *Poor's Industrials* (1931), pp. 2849–2851.
[36] *RCA Annual Report for 1935*, p. 2.

option was extended to June 30, 1938, because of the reorganization of RKO.[37] In 1939 the president of RCA testified that the option had not been exercised and had lapsed, and that at that time RCA held between 12 and 15 percent of the stock of RKO.[38]

4. RCA's phonograph and recording business

The interrelation of the phonograph and the radio was early recognized by RCA. In 1924 RCA entered into a contract with Brunswick-Balke-Collender Co. for the sale of radio apparatus for use in connection with combination radio-phonograph instruments,[39] and the following year a similar contract was made by RCA with Victor Talking Machine Co.[40] Both contracts provided that the recording artists of the phonograph companies were to broadcast over the facilities of the RCA stations.

On March 15, 1929, RCA acquired a majority, and within about 2 months 96 percent, of the capital stock of Victor Talking Machine Co. In 1928 Victor's assets had been $68,312,482; its gross sales, $52,064,419; and its net income $7,324,019.[41] RCA Victor Co., Inc., was incorporated by RCA on December 26, 1929, and took over the assets and the manufacturing and sales activities of the Victor Talking Machine Co., as well as the manufacturing and sales rights of RCA with respect to radio apparatus.[42]

As part of the transaction whereby RCA acquired stock in Victor Talking Machine Co., it also acquired the 50-percent stock interest in Gramophone Co., Ltd., of Great Britain, previously held by Victor. Gramophone Co., Ltd., had exclusive rights to manufacture and distribute Victor products in Great Britain and other foreign markets.[43] During 1931 Gramophone Co., Ltd., merged with Columbia Graphaphone Co., Ltd., to form Electric & Musical Industries, Ltd.[44] RCA's interest in this newly formed company was 29.2 percent of the "ordinary" stock and 0.02 percent of the preferred stock.[45] In 1935 RCA sold its holdings in Electric & Musical Industries, Ltd., to British interests for $10,225,917.[46]

B. THE NATIONAL BROADCASTING CO.

The early history of RCA's broadcasting activities has been set forth in the preceding chapter. These activities were, after 1926, concentrated by RCA in its subsidiary, NBC, which took over WEAF and the

---

[37] *RCA Annual Report for 1937*, p. 8.
[38] Sarnoff, Tr., pp. 8495–8496.
[39] *RCA Annual Report for 1924*, p. 9. The consummation of this contract was announced by David Sarnoff on behalf of RCA as follows:
"Under the contract recently concluded, the phonograph company gains the right to install Radiola receiving sets in combination with Brunswick phonographs. In turn, the phonograph company will add its share to the public service now rendered by the principal broadcasting stations and aid the development of free broadcasting to the public by permitting the stations of the Radio Corporation of America and those of its manufacturing associates to broadcast from the laboratories of the Brunswick Co. when its artists are recording for phonograph reproduction and to encourage these artists to aid the programs at other times as well." *New York Times*, March 13, 1924, p. 15.
[40] *RCA Annual Report for 1925*, pp. 7–8. The contract with the Victor Talking Machine Co., signed May 16, 1925, provided that RCA would manufacture receiving sets to be put into Victrolas and that Victor artists would broadcast over the facilities of station WJZ. *New York Times*, May 21, 1925, p. 16.
[41] *Report on Communication Companies*, pt. 3, pp. 4242–4244.
[42] *Id.*, pp. 4229–4230.
[43] *Moody's Manual of Investments—Industrials* (1929), pp. 790–791; *Poor's Industrials* (1929), pp. 2902–2903.
[44] *RCA Annual Report for 1931*, p. 4.
[45] *RCA Annual Report for 1933*, p. 12.
[46] *RCA Annual Report for 1935*, p. 2.

old Telephone Co. network. Thereafter, NBC, pursuant to its understanding with the Telephone Co., discontinued the use of telegraph lines and used Telephone Co. long lines exclusively for connections between stations.[47] On the business side, NBC continued to sell time to advertisers, a policy which had been inaugurated by the Telephone Co. at station WEAF, and since that time about 90 percent of its total revenues has come from that source.

1. Increase in number of NBC outlets

On November 1, 1926, there were 19 stations regularly on the NBC network. The number has steadily increased since that time. By January 1, 1928, there were 48 outlets. On December 23, 1928, the first permanent transcontinental network was instituted by NBC, composed of 56 permanent network stations. There were 154 outlet stations as of September 1, 1938, and as of December 31, 1940, the number had increased to 214. The following chart shows the increase in the number of NBC outlets:[48]

[Figures prior to Nov. 1, 1926, are for the Telephone Co. network]

Date (end of year)	Number of NBC outlets	Approximate percentage of NBC outlets to total number of licensed stations	Date (end of year)	Number of NBC outlets	Approximate percentage of NBC outlets to total number of licensed stations
1923	2	0.3	1933	85	14.6
1924	7	1.3	1934	86	14.7
1925	15	2.6	1935	87	14.1
1926 [1]	19	2.6	1936	103	15.9
1927	48	6.9	1937	138	20.0
1928	56	8.3	1938 [2]	161	22.3
1929	69	11.2	1940 [3]	178	23.3
1930	72	11.9	1940	214	25.8
1931	83	13.8	1941 [3]	221	26.4
1932	85	14.2			

[1] Nov. 1.
[2] Nov. 30.
[3] Feb. 1.

Since the time of its organization, NBC has operated two networks, the Red and the Blue. In many cases they use the same facilities and stations. As of September 1, 1938, when there were 154 NBC outlets, 23 composed the basic Red network and 24 composed the basic Blue network. Supplementing these basic networks were 107 stations, of which one was available only to the basic Red network, six were available only to the basic Blue network, and the remainder available to either.

2. Stations owned or controlled by NBC

NBC acquired station WEAF by purchase from the Telephone Co. in 1926, and WEAF became the key station of NBC's Red network. Prior to 1926, RCA had constructed and was operating station WJZ in New York and WRC in Washington. NBC's other network, the Blue, was based on WJZ, although title to WJZ and WRC was not

[47] See supra, p. 8, n. 23.
[48] This table, as well as the corresponding tables on CBS and Mutual, is based upon the record and upon reports to the Commission filed since the committee hearings. All three tables include stations not only in continental United States but also stations in the possessions and Territories.

formally transferred from RCA to NBC until 1930. Since 1926 NBC has purchased or leased, and has become the licensee of, 7 other stations located in important radio markets. The 10 stations of which NBC is now the licensee, all but one of which (WENR) operate with unlimited time, are shown in the following table:

Station	Location	Power	Date of acquisition
		Watts	
WEAF	New York	50,000	1926
WJZ	New York	50,000	[1] 1922
WRC	Washington	5,000	[1] 1923
WMAL	Washington	5,000	1933
WTAM	Cleveland	50,000	1930
WMAQ	Chicago	50,000	1931
WENR	Chicago	50,000	1931
KOA	Denver	50,000	1930
KPO	San Francisco	50,000	1932
KGO	San Francisco	7,500	1930

[1] Date of acquisition by RCA; title transferred to NBC in 1930.

At the time of the committee hearings five other stations were "programmed" by NBC under management contracts with the licensees. These stations were WGY, licensed to the General Electric Co. at Schenectady, N. Y., and four Westinghouse stations—KDKA at Pittsburgh, KYW at Philadelphia, WBZ at Boston, and WBZA at Springfield, Mass. All of these stations except WBZA [49] were licensed to operate with 50,000 watts.

The contracts under which NBC obtained the right to program these stations were made in November 1932, at the time of the consent decree [50] under which the General Electric Co. and Westinghouse agreed to dispose of their stock holdings in RCA. The contracts transferred to NBC control over the operations of the stations, insofar as the listening public was concerned, and raised serious questions under section 12 of the Radio Act of 1927 (sec. 310 (b) of the Communications Act of 1934), since the Commission's consent to a transfer of the licenses was not applied for nor obtained. Accordingly, in January 1940 the applications for renewal of the licenses of these stations were designated for hearing.[51] Shortly thereafter the management contracts were rescinded, and the five stations entered into contracts of affiliation with NBC.[52]

3. Increase in business and income of NBC

Except for the first 14 months of its existence, NBC has earned substantial profits every year. Both the volume of business and the profit have increased materially and with great regularity since that 14-month period. The following table, based upon exhibits at the

[49] Station WBZA, with a power of 1,000 watts, operates synchronously with WBZ.

[50] *Supra*, p. 11.

[51] After these arrangements had been voluntarily abandoned, the renewals were granted for reasons set forth in the orders and decision of the Commission. *In re Applications of Westinghouse Electric and Manufacturing Company for Renewals of Licenses* (stations WBZ, WBZA, KYW, and KDKA), Docket Nos. 5823–5826, September 4, 1940; *In re General Electric Company (WGY), Application for Renewal of License and Auxiliary*, October 22, 1940, Docket No. 5822.

[52] The effective date of these contracts for the four Westinghouse stations was July 1, 1940, and for the General Electric station, October 1, 1940.

committee hearings and the records of the Commission, presents a summary of the annual time sales and profit of NBC through 1940:

Year	Time sales (after discounts; before agency commissions)	Net income for the year (before Federal income tax)	Year	Time sales (after discounts; before agency commissions)	Net income for the year (before Federal income tax)
November 1926–December 1927	$3,384,519	[1] $464,385	1934	$23,535,130	$2,436,302
1928	7,256,179	427,239	1935	26,679,834	3,656,907
1929	11,353,120	798,160	1936	30,148,753	4,266,669
1930	15,701,331	2,167,471	1937	33,690,246	4,429,386
1931	20,455,210	2,663,220	1938	35,611,145	4,137,503
1932	20,915,979	1,163,310	1939	37,747,543	4,103,999
1933	18,005,389	594,151	1940	41,683,341	5,834,772

[1] Deficit.

4. NBC artists' bureau and concert service.

Within a few months after it commenced operations in 1926, NBC organized an artists' service as a department of the company for the purpose of managing concert artists, actors, announcers, writers, and other talent. In 1931 NBC acquired a 50-percent interest in Civic Concert Service, Inc., which was engaged in the business of organizing and managing concert courses throughout the country, and in 1935 NBC acquired the remaining 50 percent. In 1928 the business of the NBC artists' service amounted to slightly over $1,000,000, while in 1937 the gross talent bookings came to $6,032,274, which included the gross receipts of the Civic Concert Service Inc., amounting to $306,099. On November 1, 1938, the NBC artists' service had more than 350 artists under management contract. Civic Concert Service, Inc., had membership concert courses in 57 cities when NBC acquired an interest in the company in 1931; by 1938 the list of cities served by Civic Concert had grown to 77.

As agent for artists, NBC is under a fiduciary duty to procure the best terms possible for the artists. As employer of artists, NBC is interested in securing the best terms possible from the artists. NBC's dual role necessarily prevents arm's-length bargaining and constitutes a serious conflict of interest. Moreover, this dual capacity gives NBC an unfair advantage over independent artists' representatives who do not themselves control employment opportunities or have direct access to the radio audience. Many of these independent artists' representatives have complained to the Commission of NBC's unfair control over the supply of talent and have filed briefs in this proceeding. This problem will receive the continuing attention of the Commission and may warrant further inquiry.

5. Transcription business of NBC

NBC entered the transcription business in 1934, but did not get under way commercially in this field until about a year later. It has since engaged in the three principal phases of that business. The first is a library service, called the Thesaurus, a collection of transcribed musical selections leased or licensed to individual stations. This enables the station to produce programs by merely adding its own announcements. The second is the so-called custom-built transcription service,

consisting of full programs produced by NBC or by sponsors or advertising agencies. Such transcriptions are delivered as a complete package at a unit price to radio stations and to commercial sponsors. The third is the "simultaneous wire line recording," or recording of a program while it is being broadcast, usually for the purpose of a later rebroadcast.

In its transcription business, NBC cooperates with RCA Manufacturing Co., its affiliate, also owned by RCA. NBC arranges the programming and sells the transcriptions, while RCA Manufacturing makes the recordings. It is estimated that the total transcription business carried on in the United States in 1938 amounted to something less than $5,000,000, of which NBC-RCA accounted for $1,300,000.

Prior to April 1, 1941, NBC refused to permit any transcription company other than its associate, RCA Manufacturing Co., to make a "simultaneous wire line recording" of an NBC network commercial program. Even when the sponsor who was paying the entire expense, the agency in charge of producing the program, and an independent transcription company had come to an agreement for the transcription of an NBC network program, NBC refused to permit the independent company to come upon the premises for the purpose of making the transcription in accordance with the agreement. Independent transcription companies appeared in this proceeding and complained of this unfair competition. However, in March 1941, following the committee report and the oral argument, NBC publicly announced a change in its policy;[58] after April 1 the prohibition against the transcription of NBC network programs by independent companies would be removed and the advertiser allowed the transcription company of its choice.

C. SUMMARY OF RCA'S SCOPE OF OPERATIONS

RCA was originally founded to utilize wireless techniques for the transmission of messages; today it bestrides whole industries, dwarfing its competitors in each. Every new step has not only increased RCA's power in fields already occupied, but has enhanced its competitive advantage in occupying fields more and more remote from its beginnings.

Thus, for example, RCA's control of thousands of patents, and its experience with and ownership of prebroadcasting wireless transmitters, as well as its support from General Electric and Westinghouse, gave it a running start in the infant radio-broadcasting industry. Later, RCA's position as the leading distributor of radio receivers enabled it to enter the business of selling radio-phonograph combinations in cooperation first with Brunswick and then with Victor, and subsequently to acquire Victor, the leading phonograph and phonograph record manufacturer. This step-by-step invasion of the phonograph business, in turn, gave RCA entering wedges into the transcription and talent supply businesses; RCA-Victor artists broadcast over NBC and made RCA transcriptions, while NBC artists recorded for RCA-Victor. The result was to give RCA and its subsidiaries a marked competitive advantage over other broadcasting companies, other radio manufacturers, and other phonograph and phonograph-record companies.

[58] *Radio Daily*, March 24, 1941, p. 1.

RCA's entry into the motion-picture field, first through RCA Photophone and then through RKO, was also a step-by-step process, and similarly buttressed RCA's competitive position in other spheres. Today, with its patents, managed artists, manufacturing plants, distribution facilities, personnel, experience, and financial strength, RCA has a tremendous competitive advantage in occupying such newly opening fields as frequency modulation (FM) broadcasting and television—an advantage which may, indeed, discourage newcomers in fields where RCA has become or seeks to become dominant.

A glance at RCA's last annual report [54] is convincing of the multifarious and pervasive character of its operations:

RCA's international radio-communication service is now "world-wide" and "globe circling," with direct circuits to 43 countries. Despite the suspension of service to half a dozen German-occupied countries, the volume of traffic handled in 1940 was "the greatest in RCA history." In addition, RCA's domestic radio-telegraph service "links 12 key cities in the United States."

The use of the international radio circuits is not restricted to message traffic. Newspapers receive many of their radiophotos from abroad through RCA. Foreign programs, particularly news, are transmitted over RCA circuits for broadcasting on domestic networks.

In the field of marine communication, RCA has "maintained its leadership," furnishing some 2,200 ships with radio equipment, and operating coastal and lake port stations.

RCA's manufacturing subsidiaries operate factories in New Jersey, Indiana, and California, and also in Canada and South America. The products include many types of radio and phonograph sets, radio tubes, broadcasting transmitters and studio equipment, Victor and Bluebird phonograph records, transcriptions for broadcasting, sound equipment for motion picture studios and theaters, and public address systems, to say nothing of motion picture and radio equipment for amateurs, electron microscopes, electronic pianos, television equipment, communications equipment, and so on. Manufacturing is now the largest single phase of RCA's business.

RCA is active in technical education, and through RCA Institutes, Inc., conducts schools in New York and Chicago which offer "training in all branches of radio." Its laboratories and research organizations are extensive.

NBC's position in broadcasting is comparable to the situation of the parent company in the broader field. There are four national networks; NBC owns two of them. Approximately one-quarter of all stations in the country, utilizing nearly half of the total night-time power, are NBC affiliates. In the newer fields of international broadcasting, frequency modulation, television, and facsimile, NBC may be expected to play a major part.

The larger enterprises carried on by RCA do not blind its management to the smaller ventures which offer profitable opportunities. If broadcasters need transcriptions, NBC makes them. If broadcasters need talent, NBC will not only hire them, but is also glad to manage the artists and act as their agent in the concert as well as the radio field. Lately, with other members of the industry, it has

[54] *RCA Annual Report for 1940, passim.*

embarked upon a venture in musical copyrights (through Broadcast Music, Inc.—BMI.).

It is significant that these numerous and, for the most part, critically important activities require a capital investment which, in other fields of enterprise, would not be regarded as staggering. The assets of RCA barely exceed $100,000,000; many a railroad, utility, bank, insurance company, or industrial establishment of relatively secondary importance has assets double or treble this amount. This tends to make RCA comparatively independent of the money market.

RCA, like many other giant enterprises today, is a "management corporation." It has nearly 250,000 stockholders. No one owns as much as half of 1 percent of its stock. In such circumstances, stockholder control is practically nonexistent. RCA's funded debt is small, so there is no substantial creditor influence on the management. As a result, the management is essentially self-perpetuating, and the responsibility of the executives and directors is largely intramural.

In short, RCA occupies a premier position in fields which are profoundly determinative of our way of life. Its diverse activities give it a peculiarly advantageous position in competition with enterprises less widely based. Its policies are determined by a management subject to little restraint other than self-imposed. Whether this ramified and powerful enterprise with its consistent tendency to grow and to expand into new fields at the expense of smaller independent concerns is desirable, is not to be decided here. We have thought it proper, however, to call the attention of Congress and the public to the broader problems raised by this concentration of power in the hands of a single group.

77

III. THE COLUMBIA BROADCASTING SYSTEM

A. FORMATION AND EARLY HISTORY

The organization which later became the Columbia Broadcasting System was incorporated in New York on January 27, 1927, under the name of United Independent Broadcasters, Inc. Its purpose was to contract for radio station time, to sell time to advertisers, and to furnish programs for broadcasting. Of its original four stockholders, two, Arthur Judson and an associate, were managers of concert artists primarily interested in creating a new market for their managed talent; a third, Edward Ervin, was assistant manager of the New York Philharmonic Symphony Society; and the fourth, George A. Coats, was a promoter.

In April 1927, before United began actual operations, the Columbia Phonograph Co., Inc., became interested in the project through the Columbia Phonograph Broadcasting System, Inc., which was organized on April 5, 1927, to function as the sales unit of the network. The outstanding stock of Columbia Phonograph Broadcasting System, Inc., was originally issued to Columbia Phonograph Co., Inc., which was active in its financing, and to four individuals.[1]

The effective date of United's contracts with its original network, some of which were signed as early as March 1927, was September 5, 1927, but United experienced some delay in getting under way and the first program was broadcast over the network on September 25, 1927. United contracted to pay each of the 16 stations on its original network $500 per week for 10 specified hours of time. The sales company was unable to sell enough time to sponsors to carry the network under this arrangement, and heavy losses were incurred because of the definite and heavy commitments entered into with the stations.

Because of these losses, the Columbia Phonograph Co. and the four individual stockholders withdrew from the venture in the fall of 1927 and all the outstanding capital stock of Columbia Phonograph Broadcasting System, Inc., was thereupon acquired by United.[2] The name of the sales company was changed to Columbia Broadcasting System, Inc., and on January 3, 1929, when the sales company was dissolved, United took over its activities and its name. Columbia Broadcasting System, Inc., has been the name of the network since that time.

In November 1927 Jerome H. Louchheim, Isaac D. Levy, and Leon Levy acquired a controlling stock interest in United and controlled the network until September 1928, when William S. Paley and his family purchased 50.3 percent of the stock. In December 1927 the

[1] *Report on Communication Companies*, pt. 3, p. 4009.

[2] *Ibid.* Eleven years later the Columbia Phonograph Co. was acquired by the erstwhile subsidiary. On December 17, 1938, CBS acquired the Columbia Phonograph Co., together with three other phonograph record companies, from Consolidated Film Industries, Inc., for $700,000 cash. *Poor's Industrial Manual* (1938), p. 1276; (1940), pp. 790, 3023; *infra*, p. 25.

original affiliation contracts of March of that year were superseded by contracts which eliminated the commitment of United to pay for the station time under contract whether it was used or not. Under the new contract the station was required to pay United $50 per hour for sustaining programs and United to pay the station $50 per hour for broadcasting commercial programs.

In 1929 the Paramount-Publix Corporation, traded 58,823 shares of its own stock to CBS stockholders for all of the CBS class A stock (50,000 shares), constituting 50 percent of the outstanding stock of CBS.[3] It was agreed that if, during the ensuing 2 years, CBS should earn an average of 1 million dollars a year, Paramount would give the CBS stockholders who had taken Paramount stock the right to "put" the stock back to Paramount at $85 per share. CBS earnings during the 2-year period were in excess of the stipulated amount, but at the end of the period, Paramount was not in a position to pay the agreed repurchase price in cash. Accordingly, the 1929 agreement was modified in the following manner: Paramount sold to CBS 14,156 shares of CBS stock at $82.21 per share, which thereafter became "treasury" stock. It also surrendered the remaining 49,094 shares,[4] *pro rata* to the individual stockholders of CBS, and received from them in return the Paramount stock. This transaction released Paramount from its obligation to pay for the stock at $85 per share.[5]

Out of the 49,094 CBS class A shares returned by Paramount to the individual CBS stockholders, William S. Paley, acting on behalf of himself and other stockholders, sold 24,328 to a banking syndicate headed by Brown Brothers, Harriman & Co. at the same price per share as that used in the sale from Paramount to CBS of the "treasury" stock. The syndicate did not make a public offering of these shares, but placed most of them privately with a few individuals.[6]

The reason given for the sale of this stock by Paley and his associates to the syndicate was that they held about 10 or 11 million dollars worth of stock in CBS and they wanted to diversify their investments.[7] Their voting power, however, was not diminished correspondingly; for, on March 10, 1932, at the conclusion of the Paramount transaction, the holders of the CBS class A stock were granted the privilege of cumulative voting in electing one-half of the company's directors, while the holders of the class B stock continued to vote noncumulatively. As of the time of the committee hearings, William S. Paley and his family held about 16 percent of the class A

---

[3] At that time there were 17 CBS stockholders. To accomplish the sale to Paramount, the stock of CBS, which theretofore had been of 1 class, was divided into 2 classes, A and B, with equal number of shares. Each of the 17 stockholders received an equal number of A shares and B shares; and each stockholder then sold all his A shares to Paramount.

[4] Between 1929 and 1932 the number of shares of class A stock in CBS held by Paramount had increased from 50,000 to 63,250. There had been an additional stock issue of 5,000 shares in each class, A and B, and Paramount had purchased 5,000 shares of class A stock to keep its equity in CBS at 50 percent, and thereafter there had been declared a stock dividend of 15 percent, which amounted to 8,250 shares and brought Paramount's total stock interest to 63,250.

[5] The CBS stockholders did not hold the entire 58,823 shares of Paramount stock at that time; for 2 of the 17 stockholders had sold all of their Paramount stock on the market. The other 15 held in the aggregate 47,484 shares which they "put" to Paramount.

[6] Testimony of Ralph F. Colin, General Counsel of CBS, *Hearings on the Nomination of Thad H. Brown*, Senate Committee on Interstate Commerce, 76th Cong., 3d sess., June 12–August 23, 1940, p. 164. As of December 1, 1938, Brown Brothers, Harriman & Co. were the record holders of only 2.33 percent of the outstanding class A stock.

[7] *Ibid.*

stock and about 54 percent of the class B, or a total of about 33 percent of all the stock of CBS. Since there are 7 directors elected by each class of stock, the cumulative voting of the class A stock together with the noncumulative voting of the class B stock gives the Paley family the power to elect a majority of the entire board of directors of 14 even against the holders of the other 67 percent of the CBS stock.[8]

B. GROWTH OF CBS NETWORK

The original CBS network (then United) consisted of 16 stations. At the end of 1938, CBS had 113 outlets. The following chart shows the growth of the network:

Date (end of year)	Number of CBS outlets	Approximate percentage of CBS outlets to total number of licensed stations	Date (end of year)	Number of CBS outlets	Approximate percentage of CBS outlets to total number of licensed stations
1927	16	2.2	1934	97	16.6
1928	28	4.1	1935	97	15.7
1929	47	7.6	1936	93	14.4
1930	69	11.4	1937	110	16.0
1931	82	13.6	1938	113	15.7
1932	92	15.4	1940[1]	117	15.3
1933	92	15.8	1940	121	14.6

[1] Feb. 1.

The first station purchased by CBS was station WABC, its basic New York outlet, which was acquired in 1928. As of the time of the committee hearings, CBS was the licensee of nine stations, all of which were owned by it except WEEI in Boston, which it leased. In 1939 CBS sold one station,[9] so that it is now the licensee of the following eight stations, all of which operate with unlimited time:

Station	Location	Power	Date of acquisition
		Watts	
WABC	New York	50,000	1928
WJSV	Washington	50,000	1932
WBT	Charlotte, N. C.	50,000	1929
WEEI	Boston	5,000	1936
WBBM	Chicago	50,000	1929
WCCO	Minneapolis	50,000	1931
KMOX	St. Louis	50,000	1931
KNX	Los Angeles	50,000	1936

[8] On August 7, 1929, at the start of the Paramount transaction, the class A and class B stock carried identical rights and voting powers, except that each class of stock voting separately and noncumulatively elected one-half of the directors of CBS. After the Paramount transaction, the privilege of cumulative voting granted to the class A stockholders was the only difference between the rights and powers of the 2 classes of stock. At that time the board of directors of CBS consisted of 10 members; the class B stockholders, voting noncumulatively, elected 5 out of 10 directors and the holders of a majority of the class B shares were able to elect all 5 of these directors; while the class A stockholders, voting cumulatively, elected the remaining 5 directors, and holders of the class A stock had the right to elect 1 director for each one-fifth of the class A stock held. On March 24, 1937 (*New York Times*, March 25, 1937, p. 37), the board of directors was increased to 14, of which the holders of each class of stock had the right to elect 7. The holders of the majority of the class B stock had the power to elect 7 directors, while the holders of each one-seventh of the class A stock had the power to elect 1 director.

[9] Station WKRC in Cincinnati, which had been acquired by CBS in 1931.

In addition, CBS now holds 45 percent of the stock of Voice of Alabama, Inc., the licensee of station WAPI in Birmingham, Ala., and it has a commitment to accept, by purchase of a new issue, 40 percent of the capital stock of Pacific Agricultural Foundation, Ltd., licensee of station KQW, San Jose, Calif.

In every year since and including 1929, CBS has operated at a profit. Both gross and net income have, with few exceptions, increased year by year as is shown by the following table:

Year	Time sales (after discounts; before agency commissions)	Net income (before provision for Federal income tax)	Year	Time sales (after discounts; before agency commissions)	Net income (before provision for Federal income tax)
Apr. 5, 1927, to Dec. 31, 1927	[1] $176,557	[2] $220,066	1934	$13,699,649	$2,631,407
1928	[1] 1,409,975	[2] 179,425	1935	16,391,565	3,228,194
1929	4,453,181	474,203	1936	21,449,676	4,498,983
1930	6,957,190	985,402	1937	23,737,627	5,194,588
1931	10,442,305	2,674,158	1938	25,450,351	4,329,510
1932	11,518,082	1,888,140	1939	30,961,499	6,128,686
1933	9,437,100	1,083,964	1940	35,630,063	7,431,634

[1] Agency commissions have also been deducted from the figure for this short period.
[2] Deficit.
[3] Includes sale of talent and other services.

C. MANAGEMENT OF ARTISTS BY CBS

In December 1930, CBS acquired 55 percent of the stock of Columbia Concerts Corporation, which had been organized that year by the merger of a number of concert artist managements. Columbia Concerts Corporation has been engaged in the business of managing concert artists in all fields of entertainment. Most of its business with respect to radio relates to the appearance of its managed artists on commercial programs over national networks. Practically all negotiations for the sale of its talent are carried on, and the contracts are made, with advertising agencies. The artists managed by Columbia Concerts Corporation have appeared frequently on commercial programs over NBC as well as CBS. Indeed, the total bookings of Columbia Concerts artists for appearances over NBC, from and including the 1931–32 season to January 1939, were greater than their bookings for appearances over CBS. For the fiscal year from June 6, 1937, to June 4, 1938, the total revenue of Columbia Concerts Corporation was $426,413, and the profit for that period was $94,038. For the 1938–39 season Columbia Concerts Corporation had under management contract approximately 120 artists and in addition about 17 dancing groups, special attractions, and ensembles.

Columbia Concerts Corporation, through a division of its business known as Community Concerts Service, engages in the business of organizing and managing concerts in various communities in the United States. As of the time of the committee hearings Community Concerts had concert courses in about 375 cities and towns. Its revenue from bookings for the fiscal year from June 6, 1937, to June 4, 1938, was $165,454, and the profit for this period was $20,418.

In addition to the concert artists managed by its subsidiary Columbia Concerts Corporation, CBS through another wholly owned sub-

sidiary, Columbia Artists, Inc., also manages radio artists in all fields of entertainment. The income of Columbia Artists, Inc., comes from three sources: the booking of performances by managed artists, the sale of wires to hotels and night clubs from which dance bands are picked up, and income from the use of time by dance bands. At the time of the committee hearings, Columbia Artists, Inc., managed approximately 110 radio artists. For the 52 weeks ending January 1, 1938, the total revenue of Columbia Artists, Inc., was $194,757 and its profit $82,671.[10]

CBS' role as both employer of, and agent for, artists was the subject of complaint by independent artists' representatives just as in the case of NBC.[11]

D. PHONOGRAPH AND TRANSCRIPTION BUSINESS OF CBS

On December 17, 1938, CBS purchased from Consolidated Film Industries, Inc., the capital stock [12] of the American Record Corporation which had the following subsidiaries: Brunswick Record Corporation, American Record Corporation of California, Columbia Phonograph Company, and Master Records, Incorporated. Upon acquiring the American Record Corporation, CBS changed the name of that company to Columbia Record Corporation and that company has carried on the manufacture of phonograph records for home use.[13] In August 1940 it entered the transcription field.[14]

---

[10] In California, the management activities of CBS with respect to both concert artists and radio artists are carried on through still another company, Columbia Management Corporation of California, Inc., which is owned jointly by CBS and Columbia Concerts Corporation. Columbia Management Corp. of California, Inc., performs a function in California similar to that carried on by Columbia Concerts Corporation and Columbia Artists, Inc., in other parts of the country.

[11] *Supra*, p. 17.

[12] In a suit by a minority stockholder in the Supreme Court of the State of New York it was alleged that a CBS director had purchased 20 percent of the stock and subsequently sold it to CBS at a profit. The Court found for the minority stockholder and ordered the director to make restitution to CBS of $83,000. *Mason et al.* v. *Richardson et al.*, New York Law Journal, March 5, 1941, p. 992, column 2. CBS attorneys have announced they would probably appeal the decision. *Broadcasting*, March 10, 1941, p. 58.

[13] *Poor's Industrials* (1940), p. 3023.

[14] *Broadcasting*, August 1, 1940, p. 21.

IV. THE MUTUAL BROADCASTING SYSTEM

The Mutual Broadcasting System is organized along lines radically different from those of CBS and NBC. It does not own any stations, but it is owned by several stations. Mutual has no studios, maintains neither an engineering department nor an artists' bureau, and does not itself produce any programs except European news broadcasts. The commercial programs are produced by the originating station or by the sponsor who buys time, and the sustaining programs are selected from among those put on by the stations associated with the network.

A. FORMATION OF MUTUAL

On September 29, 1934, WGN Inc., Bamberger Broadcasting Service, Inc., Kunsky-Trendle Broadcasting Corporation, and Crosley Radio Corporation, the respective licensees of stations WGN at Chicago, WOR at Newark, N. J., WXYZ at Detroit, and WLW at Cincinnati, entered into an agreement for the purpose of securing contracts with advertisers for network broadcasting of commercial programs over their stations and making arrangements with the Telephone Co. for wire connections between the stations. WGN and WOR were to contract with the Telephone Co. for wire connections between the stations and all four stations agreed to share the expenses thus incurred.

In a supplementary contract of the same date, WGN and WOR agreed to organize a new corporation for the purpose of contracting with the Telephone Co. for the wire facilities required under the contract between the four stations. Stations WOR and WGN guaranteed the payment of any indebtedness of the new corporation to the Telephone Co. The new corporation provided for in the supplementary contract was the Mutual Broadcasting System, Inc., which was incorporated in Illinois on October 29, 1934, and which entered upon the business of selling time to advertisers over the four-station network and of making arrangements with the Telephone Co. for lines between the stations.

The capital stock of Mutual consisted of only 10 shares, of which WGN, Inc., and Bamberger Broadcasting Service, Inc., each held 5. WGN, Inc., is a subsidiary of the Tribune Co., which publishes the Chicago Tribune, and the Bamberger Broadcasting Service is a subsidiary of L. Bamberger & Co., which in turn is a subsidiary of R. H. Macy & Co. Ultimate control of the new network, accordingly, lay with the Chicago newspaper and the New York department store.[1]

The arrangement among the four stations comprising the Mutual network was carried forward by a new agreement on January 31, 1935, but the network did not expand during that year. Under the

[1] On January 20, 1936, pursuant to an amendment of Mutual's corporate charter, the Crosley Radio Corporation, licensee of WLW, acquired five newly issued shares of Mutual stock. This ownership continued only until September 26, 1936, when Crosley returned the stock to Mutual.

new contract, Mutual agreed to pay the four stations their regular card rates for network programs broadcast over their facilities, deducting for itself a commission of 5 percent and such expenses as agency commissions and wire-line charges. Station WXYZ in Detroit left Mutual in September 1935 in order to join NBC, and was replaced by station CKLW, located in Windsor, Ontario, but serving Detroit as well, and owned by the Western Ontario Broadcasting Co., Ltd. On January 31, 1936, the four-station agreement was extended for another year, and Mutual's commission was reduced to 3½ percent.

B. DEVELOPMENT OF THE MUTUAL NETWORK

Prior to 1936, WOR, WGN, WLW, and WXYZ (replaced by CKLW in 1935) were the only stations which regularly carried Mutual programs. During 1936, however, a number of stations were added to the network, including 13 in New England and 10 in California associated with regional networks (Colonial and Don Lee).

Mutual continued to increase the number of its associated stations throughout 1938, adding a Texas regional network of 23 stations during this period. As of January 17, 1939, shortly prior to the date on which Mutual presented its testimony at the committee hearings, the Mutual network included a total of 107 stations, of which 25 were also associated with NBC and 5 were also associated with CBS, and at the end of 1940 there were 160 outlets.

The following table shows the growth of Mutual:

Date (end of year)	Number of Mutual outlets [1]	Approximate percentage of Mutual outlets to total number of licensed stations
1934	4	0.7
1935	3	0.5
1936	39	6.7
1937	80	11.6
1939 [2]	107	14.8
1940 [3]	116	15.2
1940	160	19.3

[1] Station CKLW, Windsor, Ontario, Canada, is not included. See p. 15, n. 48.
[2] Jan. 17.
[3] Feb. 1.

As the number of stations on the Mutual network increased, the structure of the network grew more complex. During the period in which only four stations were regularly associated with the network each contributed one-fourth of Mutual's expenses and wire-line charges. As more stations were added, three classifications were set up: member stations, participating members, and affiliates. At the time of the committee hearings in February 1939, there were two member stations, WGN and WOR, which held stock control of Mutual. The four participating member organizations were the Colonial Network, the United Broadcasting Co. (licensee of WHKC at Columbus and WCLE and WHK at Cleveland), the Don Lee Network, and the Western Ontario Broadcasting Co., Ltd. The remaining stations associated with Mutual were affiliates.

All network commercial time sold by Mutual is sold at the card rates of the stations. The two members and four participating members pay Mutual a commission of 3½ percent, and share any network deficit, while the affiliated stations pay a commission of 15 percent. Stations associated with Mutual receive a 2-percent commission from Mutual on the proceeds of network time sold by them. The member stations underwrite all operating deficits and wire-line charges; and the participating members contribute in varying degrees toward the expenses of Mutual and their wire-line connections to Mutual's main line. The affiliated stations do not contribute toward the operating expenses or wire-line charges of Mutual as such, but, in addition to the commission of 15 percent they pay Mutual, in most cases they also pay the cost of the wire-line connection from their station to the Mutual main line.

Since the presentation of testimony by Mutual at the committee hearings during February 1939, several changes have taken place in its organization, as set forth in its brief of November 11, 1940. In January 1940 Mutual, which at that time was entirely owned by WGN and WOR, issued stock to five additional companies: the Don Lee Broadcasting Co., the Colonial Network, Inc., the Cincinnati Times-Star Co. (licensee of WKRC at Cincinnati), the United Broadcasting Co. and the Western Ontario Broadcasting Co., Ltd.[2] Mutual's board of directors was enlarged and an operating board was created for the purpose of giving representation to the nonshareholding affiliates.

The volume of Mutual's business has increased substantially since its formation, but is still not comparable to that of either NBC or CBS. The following table shows the network time sales (after discounts; before commissions) for each complete year through 1940:

1935	$1,108,827
1936	1,884,615
1937	1,650,525
1938	2,272,662
1939	2,610,969
1940	3,600,161

[2] After this change the total issued capital stock of Mutual consisted of 100 shares which were held as follows: 25, WOR; 25, WGN; 25, Don Lee; 6, Colonial Network; 6, United Broadcasting Co.; 6, Cincinnati Times-Star Co.; 6, Western Ontario Broadcasting Co., Ltd.; 1, Fred Weber (qualifying share).

V. REGIONAL NETWORKS

In addition to the three national network organizations, there are a number of networks serving particular States or areas. These regional networks operate in much the same manner as the national networks but with much smaller coverage and revenues. Evidence concerning the following 13 regional networks was introduced at the hearings in this proceeding:

Name of network	Year established	Area served
California Radio System	1936	California.
Yankee Network, Inc	1930	New England.
Colonial Network, Inc	1936	Do.
Don Lee Broadcasting System	1932	California, Oregon, and Washington.
Pacific Broadcasting Co	1937	Oregon and Washington.
Michigan Radio Network	1933	Michigan.
Texas State Network	1938	Texas.
Arrowhead Network		Northern Minnesota.
Empire State Network, Inc	1938	New York State.
Inter-City Broadcasting System	1935	Cities in Northeastern States
Pennsylvania Network	1938	Pennsylvania.
Texas Quality Network	1934	Texas.
Virginia Broadcasting System, Inc	1936	Virginia.

The first seven regional networks listed above are permanent organizations, have contractual relationships with their outlet stations resembling those of the national networks, and do a substantial amount of business. The following table gives a bird's-eye view of the relative importance in 1938 of these seven regional networks:

Name	Number of stations	Other network affiliations	Network net time sales (after agency commissions)
California Radio	9	None as network, but 6 stations individually affiliated with NBC.	$109,848
Yankee	17	None as network, but 9 stations individually affiliated with NBC.	564,225
Colonial	14	Mutual	190,758
Don Lee	28	do	547,077
Pacific	14	Don Lee and Mutual	[1] 125,825
Michigan Radio	9	Basic Blue network of NBC	133,316
Texas State	23	Network affiliated with Mutual; 4 stations also outlets for NBC and 1 for CBS.	[2] 79,469

[1] Fiscal year ending Sept. 30, 1938.
[2] Sept. 15, 1938, to Jan. 31, 1939.

As the above table indicates, most of the stations on these major regional networks also carry the programs of a national network. Indeed, most of these regionals are affiliated with a national organization on a network basis.

The other six regional networks are of relatively minor significance. Several of them were temporary, their relations with their affiliates are rather loose, and the business accounted for by them is small.

The history, operations, station relations, and finances of all 13 regional networks are described in detail in Appendix D to this report.

VI. SCOPE AND MANNER OF OPERATION OF THE NATION-WIDE NETWORKS

In determining how best to cope with the problem of stations engaged in chain broadcasting, two matters are of especial importance. One is the position of dominance in the broadcast field occupied by the two largest chain organizations, NBC and CBS. Because of the basic nature of the network broadcasting system, the ability to transmit high quality programs and the volume of commercial programs which flow through these companies, affiliation is a desirable factor for the individual broadcast stations. NBC and CBS were the first and second to enter the field (after the Telephone Co. abandoned broadcasting), and through the years they have taken steps to perpetuate their leadership and dominance.

The second set of circumstances is the nature of the contractual arrangements between networks and stations. These have a pronounced effect upon the service rendered by the affiliated stations.

In what follows, we shall occasionally contrast Mutual with NBC and CBS in respect to size, contractual structure, and mode of operation. It should be made clear that in making these contrasts we do not seek to approve Mutual practices or to set them up as ideals or models. On the contrary, we find a tendency in Mutual to follow the paths toward restrictive practices blazed by CBS and NBC. Mutual is chosen for contrast with the two larger chains merely because it is their only national competitor, and because in some respects the obstacles which it has faced clearly exhibit the restrictive effects of NBC and CBS practices.

A. PREDOMINANCE OF NBC AND CBS IN THE BROADCASTING FIELD

Of the three national network organizations, NBC and CBS are by far the largest and most powerful. Mutual was not organized until 1934, after the other two networks were already successfully established and had secured affiliations with a great number of the more desirable broadcast stations in the country.

1. Stations affiliated with NBC and CBS

At the time of the committee hearings in 1938, approximately 161 stations in the United States and the Territories and possessions were affiliated with the Red and Blue networks of NBC, 113 with CBS, and 107 with Mutual. At the end of 1940 the figures were, respectively, 214, 121, and 160. These figures, however, do not give an accurate picture of the relative predominance of NBC and CBS, for, by and large, the stations associated with Mutual are less desirable in frequency, power, and coverage.

The networks operated by CBS and NBC at the end of 1938 were composed of 267 stations in the United States. The 267 stations were classified, as to power and time designation, as follows:

Item	Class and time designation	Number commercial stations in networks of CBS and NBC			In United States	Ratio of number in networks to total number
		CBS	NBC	Total		
						Percent
1	Clear channel (50 kw. or more) unlimited time	11	17	28	30	93.3
2	Clear channel (50 kw. or more) part time		4	4	4	100.0
3	Clear channel (5 kw. to 25 kw.) unlimited time	5	9	14	14	100.0
4	Clear channel (5 kw. to 25 kw.) part time	2	2	4	4	100.0
5	Total clear channel	18	32	50	52	96.2
6	Regional (high power) unlimited time	4	4	8	8	100.0
7	Regional (1 kw. to 5 kw.) unlimited time	58	80	138	196	70.4
8	Regional (250 w. to 5 kw.) limited and daytime	2	3	5	68	7.4
9	Regional (250 w. to 5 kw.) part time	4	8	12	33	36.4
10	Total regional	68	95	163	305	53.4
11	Local (50 w. to 250 w.) unlimited time	20	33	53	227	23.3
12	Local (50 w. to 250 w.) day and part time	1		1	76	1.3
13	Total local	21	33	54	303	17.8
14	Total	107	160	267	660	40.5

It may be seen from the foregoing table that CBS and NBC together had in their networks all but two of the clear channel stations (WGN and WOR, which own Mutual), and most of the full-time regional stations. Excluding low-powered local stations, more than half of all the stations in the country were affiliated with CBS and NBC, and even including the full-time local stations, more than half of all stations were so affiliated.

Another index of network predominance is found in the proportion of the Nation's broadcasting power utilized. The 475 unlimited-time commercial stations in the United States at the end of 1938 accounted for 86.3 percent of the total time sales of all 660 commercial stations and had a total nighttime power of 1,869,400 watts [1] or 97.9 percent of the total. This total was distributed as follows: [2]

Total number of commercial stations		Number of unlimited-time stations	Total night watts of unlimited-time stations	Percentage of watts of unlimited time stations
135	Affiliated with NBC only	119	959,950	51.4
102	Affiliated with CBS only	93	658,050	35.2
74	Affiliated with Mutual only	55	117,350	6.3
25	Affiliated with NBC and Mutual	25	82,800	4.4
5	Affiliated with CBS and Mutual	5	11,200	.6
341	Total affiliated with national networks	297	1,829,350	97.9
319	Total unaffiliated with national networks	178	40,050	2.1
660	Totals	475	1,869,400	100.0

[1] This figure includes WLW as if 50,000-watt station, its normal power, although it operated experimentally on 500,000 watts until March 1, 1939.

[2] The inclusion of part-time stations or use of daytime power ratings, would not markedly alter the above ratios.

Stations on the NBC and CBS networks alone thus had over 85 percent of the Nation's nighttime wattage.

2. Ownership of stations by NBC and CBS

Apart from contractual affiliation, NBC and CBS have cemented their position as the leading radio networks by the acquisition of stations having excellent power and coverage. NBC is now the licensee of 10 stations,[3] of which 7 are clear-channel stations operating with the maximum power (50,000 watts) permissible under our regulations. CBS is the licensee of 8 stations,[4] of which 7 are clear-channel stations, operating with 50,000 watts. Almost half of the Nation's highest power clear-channel stations, accordingly, are licensed to CBS and NBC. Four other important stations in three leading markets (Washington, San Francisco, and Boston) are also licensed to NBC or CBS.

3. Proportion of broadcasting business handled by NBC and CBS

The predominance of NBC and CBS within the broadcast industry is further indicated by the distribution of proceeds from net time sales among the various units in the industry. The net time sales for the entire industry (all networks and 660 stations throughout the country) in 1938 amounted to $100,892,259, of which $44,313,778, or 44 percent, represented NBC and CBS network net time sales. The 23 stations owned or operated by NBC and CBS,[5] most of which were located in well-populated and lucrative markets, had net time sales for nonnetwork programs of $6,734,772, or 7 percent of the total net time sales of the entire industry. Accordingly, the CBS and NBC networks and the stations owned or operated by them accounted for more than one-half the total business of the entire industry. In sharp contrast, the 1938 net time sales of Mutual were only $2,015,786, or about 2 percent of the net time sales of the industry.

4. Payments to stations affiliated with NBC and CBS

Of their total network net time sales in 1938 ($44,313,778), CBS and NBC retained 73 percent ($32,046,218) and paid only 27 percent ($12,267,560) to the 253 affiliated stations on their networks during the year. Thus CBS and NBC retained over two and a half times as much of the proceeds from the sale of network time as they paid to all the 253 affiliated stations. This is accounted for in part by the usual contractual arrangements under which sustaining programs and wire-line connections are furnished to the affiliates without a separate charge.

Of the amount retained by CBS and NBC ($32,046,218), the 23 stations owned or controlled by them were credited with $5,347,388 as compensation for the broadcasting of network programs. This amount is more than one-third of the amount which was paid by NBC and CBS to the 253 affiliated stations. The large amount "paid" by

---

[3] *Supra*, p. 16.

[4] At the time of the committee hearings CBS was the licensee of nine stations. See *supra*, p. 23, n. 9.

[5] These 23 stations include 19 licensed to CBS and NBC and 4 (treating WBZ and WBZA as 1) operated by NBC under management contracts. *Supra*, p. 16.

the networks to their own stations is accounted for, in part, by the power and favorable market location of these stations.

5. Proportion of industry income received by NBC and CBS

The predominance of network organizations and their owned and controlled stations in relation to the industry as a whole, is further demonstrated by reference to net operating income.[6] The consolidated net operating income of the entire industry for 1938 was $18,854,784, of which $4,349,446 was operating income of the three national network organizations from network operations, and $14,505,338[7] was that of the 660 stations, including payments to them by networks for the broadcast of network programs. This latter amount in turn was composed of $9,696,156, in the aggregate, for the 327 stations affiliated with but not owned or operated by the three major networks;[8] $4,958,289, in the aggregate, for the 23 stations owned or operated by CBS and NBC;[9] and a loss of $149,107, in the aggregate, for the 310 unaffiliated[10] stations. The consolidated net operating income of NBC and CBS from network programs ($4,319,062) plus the consolidated net operating income of the 23 stations which they owned or operated ($4,958,289) equalled about one-half of the consolidated net operating income for the entire industry.

Mutual's net operating income for 1938 totaled only $30,384. This is accounted for by the fact that Mutual is in effect a cooperative enterprise, rendering service to its associated stations substantially at cost.

6. Income and investment[11] of NBS and CBS

The broadcasting industry does not require large capital investments. The NBC and CBS investment in tangible property devoted to broadcasting at the end of 1938 totaled $9,276,019. In that year their net operating income ($9,277,352) was actually in excess of this investment in tangible property. Their entire broadcasting investment, including intangibles as well as tangible items, was $13,411,102; their net operating income was equal to 69 percent of this amount.

NBC's investment in tangible property at the end of 1938 totaled $4,284,032. Its earnings for that year ($3,434,301) equaled 80 percent of this investment.

CBS had an investment in tangible property at the end of 1938 amounting to $4,991,988 and during that year its net earnings[12] ($3,541,741) equaled 71 percent of its investment in tangible property.

7. Disposition of NBC and CBS profits

NBC and CBS profits have been large, and for the most part have been distributed to stockholders. In the case of NBC, total earnings

---

[6] Broadcast revenue less broadcast expenses—referred to in the published tabulations of the Federal Communications Commission as broadcast income.

[7] Four hundred and twenty stations showed net incomes totaling $16,728,533; 240 showed net losses totaling $2,223,195.

[8] Of these, 238 showed net incomes totaling $10,753,650; and 89 showed net losses totaling $1,057,494.

[9] Of these, 20 showed net incomes totaling $5,086,390 and 3 showed net losses totaling $128,101.

[10] Of these, 162 showed net incomes totaling $888,493, and 148 showed net losses totaling $1,037,600.

[11] Investment in tangible property is based on cost less depreciation. Investment in intangible property is based on cost less amortization.

[12] Broadcast and nonbroadcast income less broadcast and nonbroadcast expenses.

from November 1, 1926, the date of its formation, through 1938, totaled $22,319,833. NBC began to pay dividends in 1935 and from 1935 through 1938 paid to RCA, its only stockholder, $18,100,000 (cash dividends of $14,900,000, lease negotiation fees of $2,200,000, and research and development fees of $1,000,000). Of the remaining $4,219,833, losses on financial investments unrelated to broadcasting have consumed $1,171,763; and $673,333 appropriated for goodwill and other intangibles has been charged off. At the end of 1938 $2,374,738 remained on the company's books as earned surplus.

CBS net earnings during the 12-year period of its existence through 19[illegible] totaled $22,522,471. Of this amount, $13,329,688 has been paid to [illegible] shareholders in cash dividends, and $3,543,175 in stock dividends; the remainder was largely current assets at the end of 1938.

B. CONTRACTUAL ARRANGEMENTS BETWEEN NATIONAL NETWORKS AND AFFILIATES

At the present time, the relations between a network organization and its affiliates are customarily governed by a detailed written contract. These relationships, however, have not always been on such a formalized basis. Before NBC took over the Telephone Co.'s network in 1926,[15] the relations between the network and its affiliates were embodied in correspondence only. The arrangements generally called merely for the furnishing of programs by the company on a few specified evenings. The company would pay the affiliated station a certain amount per hour for broadcasting network commercial programs, and the affiliate would pay the company a certain amount for sustaining programs.

When NBC took over station WEAF and the Telephone Co. network, it assumed these informal contractual arrangements. The amount of network service, however, increased rapidly after NBC took control. The network service supplied by the Telephone Co. had been quite sporadic; network programs were not available to affiliated stations at all hours throughout the broadcast day. But as early as 1927, NBC was on a 16-hour-per-day broadcasting schedule, and at the time of the committee hearings in 1938 NBC's broadcast day was 17 hours.

Despite this great increase in the volume of its network operations, NBC maintained its relations with its affiliates on the informal basis described above for a number of years. Unlike NBC, however, CBS adopted a formal contractual relationship with its affiliates from the very start of its network operations in 1927. As both networks grew, and competition between the two approached an equal footing, NBC also introduced formal contracts. Today NBC and CBS uniformly embody their arrangements with affiliates in detailed contracts. Since its inception in 1934, Mutual has defined its relationships with its outlet stations in detailed and standardized contracts.

The committee report states that "the heart of the abuses of chain broadcasting is the network-outlet contract." It is important to scrutinize these contracts and to determine whether station licensees have entered into arrangements which adversely affect the public interest.

---

[15] *Supra*, p. 7.

The discussion which follows concerns the standard or typical contract provisions of the three national networks; no attempt has been made to deal exhaustively with detailed exceptions to such provisions found in some individual contracts.

1. Length of affiliation contracts

Prior to 1936, NBC standard affiliation contracts were for 1 year only. Since 1936, standard contracts have been drawn to bind affiliated stations for 5-year periods but NBC for only 1, since NBC has the right to cancel on 12 months' notice.

The early CBS [14] affiliation contracts were for 1 year only. In August 1929, however, CBS entered into new contracts for 2-year periods, with options granted to CBS to extend for two successive terms of 1 year each. Since 1936, CBS, like NBC, has entered into contracts binding affiliated stations for 5 years, but binding upon itself for only 1.[15] The termination dates of both CBS and NBC contracts are staggered so that some contracts expire each year.

As of the time of the committee hearings, Mutual's affiliation contracts bound both parties for the same length of time, 1 year.[16]

2. Exclusivity

The original CBS affiliation contract, effective September 1927, enjoined CBS affiliates from making their facilities available to any other chain broadcasting company; a similar "exclusivity" provision has appeared in subsequent contracts. It was not until 1937, however, that a provision was incorporated which enjoined CBS from furnishing programs to other stations in territories served by its affiliates. The present clause, from the standard affiliation contract introduced in 1937, reads:

> Columbia will continue the station as the exclusive Columbia outlet in the city in which the station is located and will so publicize the station, and will not furnish its exclusive network programs to any other station in that city, except in case of public emergency. The station will operate as the exclusive Columbia outlet in such city and will so publicize itself, and will not join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations. The station shall be free to join occasional local, State-wide or regional hook-ups to broadcast special events of public importance.

NBC did not introduce exclusivity provisions until 1936. Since then its standard contract has contained a clause prohibiting a station from supplying its facilities to any other major network. The clause reads:

> For the purpose of eliminating confusion on the part of the radio audience as to the affiliation and identity of the various individual stations comprising radio networks, you agree not to permit the use of the station's facilities by any radio network, other than ours, with which is permanently or occasionally associated any station serving wholly or partially a city or county of 1 million or more inhabitants.

---

[14] "CBS" refers here and sometimes hereafter not merely to "Columbia Broadcasting System, Inc." but also to its predecessor "United Independent Broadcasters, Inc." The change of name occurred on January 3, 1929.

[15] The standard contract of 1936 was for 1 year but gave CBS four successive options to extend for 1 year each. The present standard contract, introduced in 1937, is for a term of 5 years with the right granted to CBS to terminate upon 12 months' notice.

[16] In January 1940, however, Mutual entered into contracts with its seven stockholders, binding on Mutual for 5 years, but cancellable by the stockholders on 1 year's notice at any time after the first 2 years.

The NBC vice president in charge of station relations testified that this clause was designed to prevent NBC outlets from affiliating with "any network which would seek to establish itself as a national advertising medium," and thus compete with NBC. NBC affiliates, he stated, are permitted to affiliate with such regional networks as the Yankee; but—

> * * * if it [Yankee] seeks to extend itself beyond the confines of New England * * * then we will raise objection * * * to the continuance of its affiliation with the National Broadcasting Co. If the Yankee network, for example, should make up its mind * * * to become a national network, it would be perfectly within their right to do so, but they should not expect to be supported by NBC programs (Hedges, Tr. 1868).

The same NBC representative further testified that, although all NBC affiliates are not as yet bound by exclusivity clauses, NBC's policy is to attempt to procure such clauses in all contracts. There was also testimony that NBC recognized its affiliates as its exclusive outlets in their areas.

At first, Mutual did not demand exclusivity provisions from its affiliates. The only exception was its contract with the Don Lee network. The parties to this contract state that when it was made, they had to assume a long-term commitment to the Telephone Co. for a wire-line connection between Chicago and Los Angeles; and that to protect this commitment, Don Lee agreed not to accept programs from any other national network and Mutual agreed not to send its programs to any other stations on the Pacific coast. There was testimony on behalf of Mutual that, since this long-term wire commitment is no longer necessary, it is willing to negotiate a new contract with Don Lee without exclusivity provisions.

Since February 1, 1940, Mutual's contracts with its 7 stockholders prohibit the 50 or more stations owned by these stockholders or affiliated with their regional networks from broadcasting programs of any other national network, or any other network having outlets in New York, Philadelphia, and Chicago. Mutual states that these clauses were designed to prevent its dismemberment by Transcontinental Broadcasting System, Inc., a proposed new network planned during the winter of 1939. The stockholders' contracts provide that the exclusivity clauses shall lapse if the Federal Communications Commission prohibits them, or if the other national networks voluntarily abandon exclusivity.

Clauses prohibiting Mutual from supplying programs to other stations in territories served by its affiliates were contained in some Mutual affiliation contracts as of the time of the committee hearings, and a Mutual official testified that as a matter of practice Mutual does not send its programs to any station in the area of an existing outlet.

3. Time options

By the terms of its first standard affiliation contract, effective September 5, 1927, United Independent Broadcasters, predecessor of CBS, purchased 10 specified hours per week outright from its 16 affiliates at $50 per hour. United lost so heavily on this contract that, although it was for a period of 53 weeks from September 5, it was superseded in December 1927 by a new type of contract.

This second contract bound United to furnish 10 hours of programs a week, at least half of them commercial, and gave United conditional options [17] on an additional 20 specified hours.[18] This was the first introduction of the time-option arrangement which has since become standard for both NBC and CBS.

The third standard contract, dated November 1928, committed CBS to supply network programs for twenty specified hours per week, and gave it an option to take up, on 30 days' notice, 10 additional specified hours per week. The periods covered by contract and option were the same as in the preceding contract.

The next CBS standard affiliation contract, dated August 1929, granted to CBS an option [19] on all the time of the station for network commercial programs. This option on all station time has been continued and is the rule today, subject to two limitations introduced at the end of 1937. One provides that a station may require CBS to give not less than 28 days' prior notice before preempting time for programs sponsored by new accounts. The other provides that a station need not broadcast network commercial programs for more than 50 "converted hours" [20] in any one week. Since CBS, at least prior to the time of the committee hearings, had never used 50 "converted hours" over any station in any week, the latter provision has never actually functioned to limit the all-inclusive option.

NBC inaugurated a system of network optional time in 1933. The NBC standard contract clause provides that upon 28 days' notice to a station, NBC can preempt time for commercial network programs during specified hours known as "network optional time." [21] From its 29 affiliates on the West coast, however, NBC has options covering all time; the reason is stated to be the time differential between New York and the Far West.

Prior to February 1, 1940, Mutual had no time-option provisions in its affiliation contracts. It entered into definite commitments with advertisers only after it had communicated with associated stations to determine whether or not the time was available. If the particular period had already been sold by any associated station, that station was under no obligation to make it available for network commercial programs.

On February 1, 1940, however, Mutual entered into time-option contracts with its 7 stockholders covering the 50-odd stations owned by them or affiliated with their regional networks. The options covered from 3¼ to 4¼ specified hours on week days and 6 hours on Sundays. The contracts expressly provide that the time-option provisions shall lapse if the Federal Communications Commission prohibits the practice or the other national networks voluntarily abandon it.

---

[17] United was given the privilege of using 6 additional specified hours as soon as permanent telephone wires were installed at each station; and, upon 30 days' notice, it was given the option and right to increase the hours to include any of 14 specified hours should additional advertising warrant.

[18] The 30 hours specified in the contract included the period from 7 to 11 p. m. 7 days per week and from 3 to 5 p. m. on Sundays.

[19] This contract was silent concerning the amount of notice necessary prior to exercise of options.

[20] One evening hour or 2 daytime hours are generally equivalent to 1 "converted hour"; a Sunday afternoon hour equals two-thirds a "converted hour," 50 "converted hours" on the average require 79 clock hours.

[21] NBC "network optional time" includes the following hours: week days, 10 a. m. to 12 noon; 3 to 6 p. m.; 7 to 7:30 p. m.; and 8 to 11 p. m.; and Sundays, 1 to 4 p. m.; 5 to 6 p. m.; and 7 to 11 p. m.

4. Rejection of network commercial programs

All three national networks have standard contract clauses defining the right of stations to reject network commercial programs.

The NBC standard clause, introduced in 1933, reads:

Upon 28 days' notice, your station will broadcast network commercial programs for NBC during any periods requested by NBC within the hours designated * * * as network optional time, provided, that because of your public responsibility your station may reject a network program the broadcasting of which would not be in the public interest, convenience, and necessity.

Since the Communications Act of 1934 imposes upon broadcasting stations the duty to operate in the public interest, this clause in effect does little more than permit affiliated stations to reject network commercial programs when to broadcast them would violate the law. The provision is interpreted by NBC to mean that a station may reject a network commercial program if the program or the product advertised is objectionable to the community, or if the station wants to substitute a local sustaining program of public interest. The NBC vice president in charge of the station relations testified:

* * * If the station believes that the substitution of a local program would be more in the public interest than the program which was offered to him by the network he makes that substitution, but we insist that he must be on firm ground, that he must be able to support his contention that what he has done has been more in the public interest than had he carried on the network program. (Hedges, Tr. 1795).

While an affiliated station may substitute a local sustaining program for a network commercial program under such circumstances, it may not similarly substitute a local commercial program. Indeed, the NBC standard affiliation contract has a special provision for liquidated damages which compels the affiliate to pay over to NBC whatever increased revenue it receives from such substitution:

Provisions for liquidated damages.—In the event you substitute a program for a network program which you are obligated to broadcast hereunder you agree to pay us as liquidated damages a sum equal to the amount by which the total moneys you receive for broadcasting the substituted program during the scheduled period of said network program exceeds the moneys you would have received from us had you broadcast said network program. This provision is without prejudice to any other rights which we may have under this agreement arising from your failure to broadcast any of our network programs, and shall not be deemed to give you the option to refuse to accept such a network program by making the payments specified in the foregoing sentence.

This clause effectively removes all monetary incentive to substitute local commercial for network commercial programs.

The CBS clause covering rejection of programs, first introduced in 1937, reads:

The station will broadcast all network sponsored programs furnished to it by Columbia during the time when the station is licensed to operate * * *. Either the station or Columbia may on special occasions substitute for one or more of such sponsored programs sustaining programs devoted to education, public service or events of public interest without any obligation to make any payment on account thereof, and in the event of such substitution by either party it will notify the other by wire as soon as practicable after deciding to make such substitution. In case the station has reasonable objection to any sponsored program or the product advertised thereon as not being in the public interest the station may, on 3 weeks' prior notice thereof to Columbia, refuse to broadcast such program, unless during such notice period such reasonable objection of the station shall be satisfied. * * *

This clause, like the similar clause in NBC contracts, provides in effect merely that stations may reject programs if to carry them would violate the public-interest provision of the Communications Act of 1934.

As has been noted, Mutual held no options on station time at the time of the committee hearings. No Mutual station was required to accept a network commercial program unless it had the time available, and even then it could reject for any of several reasons. A typical Mutual contract reads:

> * * * It is agreed that each station shall have the right to refuse to accept any contract tendered to it hereunder;
>
> (*a*) If in the opinion of the station management the programs which the advertiser purposes to broadcast under such contract are for any reason unsatisfactory in character, quality, or content; or
>
> (*b*) If in the opinion of the station management the products to be advertised are undesirable or objectionable; or
>
> (*c*) If the station management determines in its sole discretion that the advertiser is not a good credit risk.

It should be noted that the Mutual clause explicitly places the right to determine whether a program is objectionable in the hands of the individual station, where the legal responsibility also lies. Moreover, even after a station commits itself to broadcast a network commercial program, it reserves the right to appropriate any or all of the time for broadcasting a local sustaining program of unusual interest.

The basic problem with respect to rejection of network programs, however, does not rest merely in the precise wording of legal contracts. There is also involved the practical problem of supplying stations with enough information about network programs sufficiently in advance to enable them to make intelligent decisions.

At present, networks send their affiliates notices stating the length of the program series, the length of each program, the time of broadcasting, the name of the sponsor, the product to be advertised, and the general type of program; that is, whether it is to be variety, drama, dance music, etc. In some cases the names of the persons appearing on the program may also be given. It is obvious that from such skeletal information the station cannot determine in advance whether the program is in the public interest, nor can it ascertain whether or not parts of the program are in one way or another offensive. In practice, if not in theory, stations affiliated with networks have delegated to the networks a large part of their programming functions.

In many instances, moreover, the network further delegates the actual production of programs to advertising agencies. These agencies are far more than mere brokers or intermediaries between the network and the advertiser. To an ever-increasing extent, these agencies actually exercise the function of program production. Thus it is frequently neither the station nor the network, but rather the advertising agency, which determines what broadcast programs shall contain. Under such circumstances, it is especially important that individual stations, if they are to operate in the public interest, should have the practical opportunity as well as the contractual right to reject network programs.

5. Sustaining programs

NBC and CBS actually produce a great many of their sustaining programs. They spend large sums of money for such production,

as well as for the broadcasting of sustaining programs which they do not themselves produce, such as concerts and special events. Mutual, on the other hand, does not produce sustaining programs itself; it selects programs which it considers suitable for its network from among the sustaining programs produced by its outlets, and distributes such programs to the other stations on the network.

All three national network companies make sustaining programs available to their respective affiliates at no separate charge; but the cost of producing and distributing them is reflected in the plan of station compensation.

NBC guarantees most of its outlets 200 "unit hours" [22] of network commercial and sustaining programs during each 28-day accounting period; CBS guarantees 60 clock hours a week; and Mutual makes no guarantees. In practice, however, all three networks make programs available throughout the broadcast day—generally 16 or 17 hours.

Unlike network commercial programs, sustaining programs may be accepted or rejected at will by stations affiliated with (but not licensed to) any of the 3 network organizations. The stations licensed to NBC and CBS, however, are required to broadcast certain so-called "immovable" sustaining programs. NBC Red network immovables numbered 22 at the time of the committee hearings, including the Radio Pulpit, the University of Chicago Round Table, The World Is Yours, and the Metropolitan Opera. The 24 Blue network immovables included the NBC Symphony Orchestra, Dr. Walter Damrosch's Music Appreciation Hour, the Farm and Home Hour, and America's Town Meeting of the Air. CBS "must" sustaining programs for the stations licensed to it totaled 6½ hours per week, and included the New York Philharmonic Symphony Orchestra, the CBS School of the Air, and certain educational programs. Mutual owned no stations, and hence had no immovable sustaining programs.

6. Station compensation

The early NBC arrangements for compensation to and from its affiliates were modelled on previous arrangements between the Telephone Co. and its affiliates.[23] One of the last Telephone Co. network contracts,[24] for example, provided that the station would pay $45 per hour for sustaining programs, and would receive $40 per hour for commercial programs. Similar arrangements were continued after NBC took over the network, and hourly rates were in general standardized. From 1927 to 1930, NBC paid most of its stations $50 per evening hour and $30 per daytime hour for commercial programs, and charged most of them $45 per evening hour and $25 per daytime hour for sustaining programs. The exceptions were the few stations so necessary to NBC that they could insist upon increased rates from NBC for commercial programs or lower charges for sustaining programs.

NBC maintained the same commercial rates from 1930 to 1932, but sustaining-program charges were reduced to $25 per evening hour and $15 per daytime hour. In 1932, hourly charges for sustaining programs were abolished, and a flat charge of $1,500 per month sub-

[22] A "unit hour" is equivalent to 1 evening hour. A Sunday afternoon hour counts as three-fourths of a unit hour and a daytime hour counts as one-half.

[23] *Supra*, p. 34.

[24] Contract between the Telephone Co. and the owners of station WLIT in Philadelphia, dated September 10, 1926.

stituted, regardless of the number of sustaining programs the station used.

In 1935, NBC introduced a new system of payments to stations in connection with a readjustment of station rates to advertisers which rates, with minor changes, have remained in effect. NBC has stated that, in establishing these rates, it gave primary consideration to the "potential circulation" or number of potential listeners in the area served by each station; and that it did not take into account such factors as the number of stations serving the area or the purchasing power of its inhabitants.

Advertisers were charged from $120 per evening hour for the smallest stations to $680 per evening hour for larger stations, $720 for WMAQ and WENR in Chicago, and $1,200 for WEAF and WJZ in New York and WLW in Cincinnati.

Stations were remunerated according to a complex formula based upon these rates to advertisers. For the first 16 "unit hours" of network commercial programs during each 28-day accounting period, a station received no compensation; for the next 25 unit hours it received 20 percent of the average unit rate;[25] for the next 25 unit hours it received 30 percent; and thereafter 37½ percent. Under this schedule, stations were not required to pay separately for sustaining programs.

The following table shows NBC network time sales, its receipts from sustaining program charges, its payments to affiliated stations, and other relevant figures:

Year	Time sales for network programs (after discounts; before commissions)		Compensation to stations[1] for broadcasting network programs	
	Commercial programs	Sustaining programs sold to stations	Amount	Ratio to network time sales (percent)
Nov. 1926–Dec. 1927	[2] $3,384,519	$500,507	$577,522	17.06
1928	[2] 7,256,179	770,702	1,486,146	20.48
1929	[2] 11,353,120	726,335	2,372,740	20.90
1930	[2] 15,701,331	698,001	3,038,112	19.35
1931	[2] 20,455,210	903,615	3,962,047	19.37
1932	[2] 20,915,979	980,818	3,911,346	18.70
1933	[2] 18,005,369	987,587	3,383,995	18.79
1934	[2] 23,535,130	1,021,247	5,000,650	21.25
1935	[2] 26,679,834	941,428	5,875,188	22.02
1936	[2] 30,148,753	([3])	6,123,749	20.31
1937	31,436,874	60,384	7,166,363	22.80
1938	31,783,277	20,470	7,809,014	24.57
1939	33,540,841	19,368	9,021,872	26.90
1940	37,118,130	19,693	10,562,212	28.45

[1] "Stations" in this table refers to stations affiliated with but not owned or operated by NBC.
[2] Total time sales; network time sales not available.
[3] Charges for sustaining programs were abolished by NBC as a part of its network relationship with stations after the revision of its rate structure and system of compensation in 1935.

CBS's arrangements for station compensation have been somewhat different. In its first standard affiliation contract, in effect from September to December 1927, the network agreed to pay each station $50 per hour for 10 specified hours per week whether or not the hours were actually used by the network. This arrangement was modified in the second contract, dated December 1927, which provided that CBS was to pay the station $50 per hour for all hours

[25] The "unit rate" is the gross card rate per hour, before deducting discounts or agency commissions.

used commercially and to supply sustaining programs for the remainder of the time covered by the contract, charging the station $50 per hour for them. The contract provided that at least 50 percent of the hours used by CBS must be devoted to sponsored programs.

The third CBS contract, dated November 1928, eliminated payments by the station for sustaining programs and provided that the station waive compensation for the first 5 hours of commercial network programs per week. For all network commercial hours in excess of the free time, CBS agreed to pay each station a specified hourly rate. CBS agreed also to furnish sustaining programs for all hours not used for commercial programs, which were either under contract or under an option exercised by CBS.

The next standard affiliation contract, that of August 1929, established the method of compensation which has remained in effect since. A distinction was made for the first time between an evening and a daytime hour. The term "commercial hour" was defined to include only an evening hour, and it was provided that the compensation to the station for a daytime hour was to be one-half its evening compensation and that the 5 hours of commercial programs per week on which the station waived compensation were to be "commercial hours" as defined in the contract. A "commercial hour" was referred to in later affiliation contracts of CBS as a "converted hour."

Charges to advertisers for the use of CBS network facilities are determined by the CBS rate card, which lists the stations available, the groups in which they must be purchased, and station rates ranging from $125 to $1,250 per converted hour. The rate applicable to each station is determined by CBS after a consideration of the station's market, its relative popularity, its power and physical coverage, and the price at which it sells time to national advertisers for national spot business.

The following table shows the increase in annual sales of network time by CBS from 1927 through 1940, the increase in payments to affiliated stations, and the ratio of those payments to the network time sales of CBS:

Year	Time sales for network programs (after discounts; before commissions)	Compensation to stations [1] for broadcasting network programs	
		Amount	Ratio to network time sales (percent)
1927 (Apr.–Dec.)	[2] $176,538	[3]	
1928	[2] 1,409,975	[3]	
1929	[2] 4,720,074	$734,163	15.55
1930	[2] 8,082,664	1,003,749	12.41
1931	9,480,282	1,478,307	15.59
1932	10,218,800	1,805,211	17.67
1933	8,008,988	1,446,827	18.07
1934	11,888,741	2,604,854	21.91
1935	14,087,695	3,394,428	24.09
1936	18,550,621	4,806,699	25.91
1937	21,969,089	5,556,623	25.29
1938	21,254,686	4,969,688	23.38
1939	26,450,511	6,933,887	26.21
1940	31,181,444	8,722,303	27.97

[1] "Stations" in this table refers to stations affiliated with but not owned or operated by CBS.
[2] Total sales; network time sales not available.
[3] Not available.

Mutual has no network rate card similar to that of NBC or CBS; it charges advertisers at the card rates of the stations associated with it. Mutual does not set these rates and has no control over them.

Mutual receives a 3½ percent commission on all proceeds, after agency commissions, from network programs broadcast over the facilities of its "members" and "participating members"; and 15 percent in the case of its "affiliated stations." All stations on the network, regardless of category, receive a 2 percent commission on the proceeds of programs which they sell on behalf of the network.

Mutual "affiliates" pay for the telephone circuits from their facilities to the nearest connecting point on the Mutual line. WOR and WGN, the two "member stations," each pay a share of Mutual's budgeted operating expenses; each was paying $3,775 per month at the time of the committee hearings. They also guarantee Mutual's telephone circuit expenses, and underwrite equally any operating deficit which Mutual may incur. Mutual's "participating members" have various arrangements. Colonial pays for its telephone circuit to the Mutual main line in New York; Don Lee contributes five-eighths of the telephone circuit expense from Chicago to the coast. Each contributes to Mutual's budgeted operating expenses equally with WGN and WOR. United Broadcasting Co. pays the cost of the telephone line connecting it with the Mutual system, plus $2,775 per month toward operating expenses. CKLW guarantees to Mutual all the proceeds up to $30,000 of annual net time sales of Mutual programs over its facilities. It pays Mutual 85 percent of the proceeds from the next $25,000 of such sales and 50 percent of sales in excess of $55,000.

Mutual contends that their associated stations receive a greater share of the proceeds from Mutual network business than do the stations associated with the other two national networks. This is true, since Mutual is a cooperative enterprise. It should be noted, however, that many of the expenses borne by NBC and CBS are, in the case of Mutual, borne by the stations. Whether or not, if computations on a basis comparable to those made in the case of NBC and CBS were possible, Mutual stations would be shown to receive a larger proportion of the network intake cannot be determined.

7. Network control over station rates

The rate at which NBC bills advertisers for the use of each outlet is specified in the NBC rate card, and also in the NBC affiliation contract with that outlet. The rate usually referred to as the "station rate" is the rate for an evening hour. The rate for other periods is derived by multiplying the evening hour rate by the appropriate fraction; one-half for a daytime hour, three-quarters for a Sunday afternoon hour, and one-third for an hour after midnight.

NBC retains for itself effective control over network station rates. It may increase the network station rate of any affiliate, and it may decrease the network station rate of any affiliate upon 90 days' notice, if at the same time it reduces the rates of a majority of its affiliates. Moreover, it may decrease a single station's rate on 1 year's notice; but if it does so, the station has the option of terminating the affiliation contract. An outlet station does not have the power either to

raise or lower its network rate during the period it is bound to NBC by an affiliation contract, the standard term of which is for 5 years.

Some time after 1935, a clause was incorporated in the standard NBC affiliation contract, which provides that NBC may reduce a station's network rate and compensation from network commercial programs to the extent that the station accepts from national advertisers "net payments less than those which NBC receives from the sale of your station to network advertisers for corresponding periods of time." This provision is intended to prevent outlet stations from securing such revenues as they might otherwise derive from the sale of time to advertisers for national spot business at rates lower than those set forth in the NBC rate card for national network business.

The network station rates of the outlets of CBS are set forth in the CBS rate card; but as a general rule they are not set out in the individual standard affiliation contracts. The rate for an evening hour is usually referred to as the "station rate." The rate for a daytime hour is derived by multiplying the evening hour rate by one-half, that for an hour after midnight by multiplying the station rate by one-third, and that for a Sunday afternoon hour by multiplying the station rate by two-thirds. A station does not have the power to change its network rate during the term of its affiliation contract. Although the standard affiliation contract is silent on the point, in certain of its contracts with its affiliates CBS has retained the power to change a station's network rates.

Mutual bills its advertisers for network programs at the rates established by the outlet stations themselves. Each outlet is free to change its rate at any time, and Mutual has no power to alter it.

C. NBC'S TWO NETWORKS—RED AND BLUE

The NBC "Red" and "Blue" networks are not separate and distinct entities with respect to the stations comprising them, the programs broadcast over them, their organization and personnel, or their property and equipment. Indeed, in certain respects there is not even the semblance of a distinction between the two networks.

As of September 1, 1938, 154 stations were licensed to or affiliated with NBC. Of these, 23 constituted the basic Red network and 24 the basic Blue network. Both these basic networks are located in the area from New England to Omaha north of the Mason and Dixon Line, which, although comprising only about one-third of the area of the United States, holds about two-thirds of its population.

Of the 107 affiliated stations not on either basic network, one was available only to the Red network and six were available only to the Blue network. Thus 23 basic and 1 supplementary station were associated only with the Red network; 24 basic and 6 supplementary stations were associated only with the Blue network. The remaining 100 NBC affiliates were supplementary to either the basic Red or the basic Blue network, at the option of advertisers. Individual stations within this group are often referred to as belonging to that network with which they are most frequently connected; but such designations may be erroneous for specific broadcasts.

NBC affiliation contracts do not specify with which network a station is to be associated, even in the case of stations actually on the basic Red and the basic Blue networks. Since the contracts omit all reference to the matter, NBC has the power to shift a station from the far more remunerative Red network to the less remunerative Blue network or vice versa at any time, regardless of the station's wishes.

With respect to programs as well as stations, the Red and Blue networks overlap. Where a program is carried over either the Red or the Blue basic network a distinction can be made. But those NBC sustaining programs which are broadcast over supplementary stations only are neither Red nor Blue.[25] NBC does not identify such programs, and there is in fact no way to label them.

The Red and Blue networks are not separate business enterprises, nor are they even two distinct operating divisions or departments within NBC. All its property, including studios, offices, and equipment, is equally and interchangeably available to both the Red and Blue networks. NBC announcers, musicians, talent, and engineers are used interchangeably; and, with two exceptions, no distinction is made in the duties of NBC personnel either in New York or in the field.

One exception is the sales department. A special division to promote Blue network sales was established in this department in 1938, and in December 1940, after the close of the committee hearings in this proceeding, the department itself was split into two sections, one for each network. At the same time, the program department was similarly split.

NBC does not allocate income or expenses between the Red and Blue networks; indeed, its treasurer testified that in view of the many ways in which operations intertwine, it would be practically impossible to allocate between them.

Additional evidence that the Red and Blue networks do not compete, and that NBC itself considers them integral parts of a single enterprise, is found in the company's discount policy. Discounts range from 2½ percent for advertisers who broadcast 13 weeks or more and whose gross billings total $1,000 a week or more, to 25 percent for advertisers whose gross billings total $1,200,000 a year or more. These discounts are based on combined billings of the two networks, and are granted regardless of whether one network is used or both.

---

[25] At the time of the committee hearings, NBC generally required that the basic Red network of 23 stations or the basic Blue network of 24 stations be purchased as a unit. There was the additional requirement in connection with the Red network facilities that in the evening between 8 p. m. and 10:30 p. m., an advertiser use a minimum of 50 stations. In the daytime, an advertiser was permitted to use less than all the basic Blue, but not less than the basic Red network. NBC supplementary stations were divided into 15 geographical groups largely for selling purposes, and an advertiser could add these stations to the basic networks in groups, and in some cases individually, to meet his merchandising problem.

CBS generally required an advertiser to purchase a minimum of 24 out of its basic network of 26 stations, but there were some exceptions to this rule during the daytime. The remaining stations affiliated with CBS, known as optional stations, were individually available to advertisers, with the exception of three groups which, because of the long wire haul from the basic network, were available only in units consisting of all or a majority of the stations in each group.

Mutual generally required advertisers to use a minimum of only three stations, WOR, WGN, and WLW, but an advertiser could use only two of them if he assumed the expense of the wire connection between them. The remaining stations associated with Mutual were for the most part available at the option of advertisers.

VII. THE EFFECT OF NETWORK-AFFILIATE RELATIONS ON COMPETITION IN THE RADIOBROADCAST INDUSTRY

The Communications Act "recognizes that the field of broadcasting is one of free competition."[1] In certain other industries, such as railroads, telephones, and bituminous coal, where competition has not been effective in protecting the public interest, Congress has substituted detailed governmental control of rates, prices, finances, or other matters for the principle of free competition. But in regulating radio, "Congress intended to leave competition in the business of broadcasting where it found it."[2]

It has long been a basic hypothesis of the American system that competition in a free market best protects the public interest. This hypothesis, moreover, has been given the force of law throughout the entire field of interstate commerce. For more than half a century contracts and combinations in restraint of trade, and monopolization or attempted monopolization of interstate commerce, have been outlawed.[3] The fundamental purpose of this legislation is "to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade."[4] The Sherman Act was enacted "to preserve the right of freedom to trade"[5] and it is "based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition."[6]

The prohibitions of the Sherman Act apply to broadcasting.[7] This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. In the absence of Congressional action exempting the industry from the antitrust laws, we are not at liberty to condone practices which tend to monopoly and contractual restrictions destructive

---

[1] *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474.

[2] *Id.*, p. 475.

[3] Secs. 1 and 2 of the act of July 2, 1890 (26 Stat. 209), commonly known as the Sherman Act. Of particular pertinence here is sec. 1 reading in part as follows:

"Every contract • • • in restraint of trade or commerce • • • is hereby declared to be illegal. Every person who shall make any such contract • • • shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

[4] *Ramsay Co.* v. *Associated Bill Posters*, 260 U. S. 501, 512.

[5] *United States* v. *Colgate & Co.*, 250 U. S. 300, 307.

[6] *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 397.

[7] This conclusion would be required even if the Communications Act were silent on the question. Sec. 313, however, expressly declares that the Federal antitrust laws are applicable to broadcasting: Sec. 313. "All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of • • • radio apparatus and • • • to interstate or foreign radio communications." Sec. 3 (b). "'Radio communication' • • • means the transmission by radio of • • • sounds of all kinds • • •" Sec. 3 (o) "'Broadcasting' means the dissemination of radio communications intended to be received by the public • • •"

of freedom of trade and competitive opportunity. Had we liberty in this regard we should require a very clear showing that such practices or restraints, because of conditions peculiar to the industry, promote the best interests of the listening public. In any event, preservation of the fullest possible measure of competitive opportunity consistent with furnishing the public adequate broadcasting service is one of the elements to be considered in applying the statutory standard of "public interest, convenience, or necessity."

The nature of the radio spectrum is such that the number of broadcasting stations which can operate, and the power which they can utilize, is limited. The limitations imposed by physical factors thus largely bar the door to new enterprise and almost close this customary avenue of competition. NBC's brief, taking cognizance of this situation, states: "Free competition in any enterprise exists only when the field is open to everyone." The conclusion which NBC draws is that, because one of the usual concomitants of free competition is barred by physical factors, the members of the industry should be permitted to erect contractual barriers against any competition.

Precisely the opposite conclusion is required. An inherent restriction on competitive opportunity does not justify the superimposition of artificial restraints, but rather makes such restraints peculiarly onerous. Restrictive affiliation contracts might be tolerated if there were a dozen potential stations of comparable character in every city; they are intolerable when there are few cities which have (or can have) more than four stations of all kinds.

The very fact that in the broadcasting industry competition is restricted renders it all the more imperative that competition be not throttled by restrictive agreements. The words of Mr. Chief Justice Hughes, speaking for a unanimous Court in an important case, are applicable:[8]

> The fact that, because sugar is a standardized commodity, there is a strong tendency to uniformity of price, makes it the more important that such opportunities as may exist for fair competition should not be impaired.

The Commission has recently had occasion to emphasize the public benefits of competition among radio stations:[9]

> Competition between stations in the same community inures to the public good because only by attracting and holding listeners can a broadcast station successfully compete for advertisers. Competition for advertisers which means competition for listeners necessarily results in rivalry between stations to broadcast programs calculated to attract and hold listeners, which necessarily results in the improvement of the quality of their program service. This is the essence of the American system of broadcasting.

The benefits of competition are equally clear in the field of network broadcasting. If national networks compete for station outlets on the basis of performance, there will be a direct incentive to improve and expand the programs, both sustaining and commercial, which they offer to the public. Likewise, if stations are not tied exclusively to a single national network over a long period of time and if stations compete for access to one or another national network—a matter often essential to profitable operation—each will be stimulated to improve the quality of the programs which it offers and hence its value as an outlet of a national network. This two-way competition—among net-

---

[8] *Sugar Institute, Inc.* v. *United States*, 297 U. S. 553, 600. See also *United States* v. *Terminal Railroad Assn. of St. Louis*, 224 U. S. 383.

[9] *In re Spartanburg Advertising Co.*, Docket No. 5451, Jan. 9, 1940.

work organizations for station outlets and among stations for network affiliation—will insure the listening public a well-diversified, high quality program service.

Competition among stations will, however, necessarily remain a thing of shadow rather than of substance as long as conditions now prevailing are permitted to continue. As the facts set forth in this report demonstrate, profitable operation is often contingent upon a station's participation in national network broadcasting.[10] NBC and CBS now dominate this field; their ownership and operation of important radio stations and their restrictive long-term contracts with other stations enable them to maintain indefinitely their present monopolistic position.[11] These conditions prevent their one existing competitor (Mutual) from seriously encroaching on their domain and practically foreclose the possibility of new competition: affiliated stations are treated as, and constitute, mere adjuncts of NBC and CBS.

NBC and CBS contend that the networks compete, and compete vigorously. Certainly there is a considerable degree of competition among networks for advertisers and for listening audiences; but this does not mitigate the restraints found with respect to network-station relationships. In the radiobroadcasting field, three different markets must be distinguished—the market in which networks and stations meet advertisers, the market in which networks and stations meet listeners, and the intermediate or internal market where stations meet networks. It is in this intermediate network-station market that current practices have most directly restrained competition; no considerations of the extent to which the networks may compete for advertisers or listeners can conceal the extent to which they do not compete in the network-station market.

The restraints which we here consider have not been achieved in either of the two more common ways—through coalescence of the networks or through coalescence of the stations. Rather, they have been achieved through coalescence of some stations with one network and other stations with another. But the result is nonetheless to destroy the free market and to substitute for interplay of competitive forces a sort of monolithic rigidity. Stations bound by the usual 5-year exclusive contracts are not free to bargain with other networks for programs; networks are not free to bargain with those stations for time; and the door is closed against new networks. The result is to restrict the flow of programs from producers to listeners.

The present stratification in the field of network broadcasting is largely the result of the efforts of NBC and CBS to maintain their dominant position. The way in which the restraints in this field have

[10] It has been shown that in 1938 the 310 stations not affiliated with any national network had a consolidated loss of about $149,000, whereas the 350 remaining stations affiliated with some national network had a consolidated net operating income of about $15,000,000 (*supra*, p. 33). Moreover, the consolidated net operating income of NBC and CBS and the 23 stations which they owned or operated equalled nearly half the consolidated net operating income of the entire industry (*supra*, p. 33).

[11] On the question of the dominant position of NBC and CBS, it has been shown that stations affiliated only with either NBC or CBS represent over 85 percent of the total nighttime power of unlimited-time stations in this country (*supra*, p. 32). The ratio would not be materially altered by the inclusion of part-time stations or the use of daytime power ratings (*ibid*). As to the effect of long-term contracts, restrictive contract provisions, and network ownership and operation of stations in stratifying the present setup in the industry see *infra*, pp. 51–79.

grown up is significant both in understanding their actual effect, and the intent with which they were adopted:

(1) CBS, almost from the first, tied up its stations with contracts which had the obvious and calculated effect of removing them from competition for 4- and 5-year periods.

(2) NBC did not adopt the restrictions during the early years. Indeed, in 1931, NBC's president asserted with justifiable pride that NBC "holds its network stations together only by the superiority of its network program service and by the demand of listeners for NBC network programs."[12] But when a new network, Mutual, entered the market, NBC abandoned its reliance upon program superiority and listener demand and removed its stations from competition through 5-year exclusive contracts modelled on the CBS pattern. Mutual thus remained the only adherent to the theory of a free station-network market until 1940.

(3) Thereupon a fourth network organization was projected: Transcontinental Broadcasting System. The stations on the NBC and CBS networks were inaccessible. Mutual stations, however, were open to advances from the new network, but there were few desirable stations with which Mutual could offset such losses. Mutual, like NBC earlier, promptly introduced restraints into its more important affiliation contracts.

(4) The upshot of the whole business is that today only a negligible proportion of the Nation's total nighttime broadcasting wattage is free to bargain in the network-station market.

NBC and CBS oppose the opening of the network-station market to competition. Although requested at the oral argument to present proposals for the furtherance of competition in the industry, no such proposals have been forthcoming. Instead, both urge that they deserve a kind of protected status because of their pioneering and their "first comer" position. NBC says that regulations of the type we propose would make it "easier to reap where NBC has sown." CBS says that "the fruits of enterprise must be preserved."

Clearly the Communications Act neither grants, nor authorizes the Commission to recognize, the claim to a vested right which is asserted. The grant of a station license confers upon the licensee no vested right to continuous operation.[13] A network organization, which is superimposed upon station licensees, cannot give rise to rights superior to those upon which it itself rests.

A contention similar to that urged by NBC and CBS was squarely rejected in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470. It was there urged that the Commission, before authorizing construction of a new station, was required

---

[12] *In re National Broadcasting Co., Inc.* Testimony of Merlin Hall Aylesworth, Docket No. 1221, June 15, 1931, p. 43.

[13] Sec. 304 requires every applicant for a station license to waive "any claim to the use of any particular frequency or of the ether." Sec. 309 (b) (1) provides that the grant of a station license "shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof." That the grant of a station license confers no vested right is further conclusively shown by the authority given the Commission to refuse to renew a station license (sec. 309 (a)) and by the limitation of all station licenses to a maximum period of 3 years (sec. 307 (d)).

See also *American Bond & Mortgage Co.* v. *United States*, 52 F. (2d) 318 (C. C. A. 7, 1931), *cert. den.*, 285 U. S. 538.

to determine whether such action would cause economic loss to an existing licensed station. The Court, in holding that the Commission was not required to give such loss "separate and independent" consideration, said (p. 476):

> If such economic loss were a valid reason for refusing a license *this would mean that the Commission's function is to grant a monopoly in the field of broadcasting, a result which the Act itself expressly negatives* * * * [Italics added.]

We are not aware that existing networks entered the field believing that they had exclusive franchises; nor are we aware that the networks have accepted the duties customarily associated with such franchises. So far as "preserving the fruits of enterprise" is concerned, we note that NBC and CBS are not immature enterprises which, having invested heavily in preliminary exploration, are now about to enjoy the fruits of their investment. Both have reaped, and reaped richly, almost since the time of their foundation. When the tremendous returns on investment which each has received, amounting in 1938 alone to 80 percent of the investment in tangible property in the case of NBC and 71 percent in the case of CBS, are pointed out, both defend such rates of return by insisting that networks are service enterprises in which profits are not a function of investment. They can hardly argue simultaneously that their investment, already returned many times over, is an essential element in radiobroadcasting which deserves to be protected by monopolistic rights.

The established position of NBC and CBS in the industry is a reason against, rather than for, permitting them to consolidate that position by restrictive covenants or by ownership or operation of stations. Their financial resources, diversified activities, trade contacts, and established listener goodwill [14] impose handicaps, difficult enough to overcome, upon any rival in the field of network operation.

Mutual states that there should be competition in the broadcasting field, but proposes, for example, that exclusivity be abolished and option time restricted only with respect to those stations serving cities with three or fewer comparable full-time stations. The effect of Mutual's proposals would be to open up the field to competition among the existing networks; but these proposals would buttress their positions vis-à-vis all others. Such a result, while no doubt welcome to Mutual, would hardly ensure the degree of competition which the Communications Act envisions and the public interest requires.

A constantly improving service to the public requires that all the competitive elements within the industry should be preserved. The door of opportunity must be kept open for new networks. Competition among networks, among stations, and between stations and networks, all of which profoundly affect station service, must be set free from artificial restraints. It is not in the public interest for any licensee station to make arrangements which tend to close that door or restrain that competition. Pursuant to the mandate of Congress that it grant licenses and renewals only to stations operating in the public interest, this Commission must refuse further to license stations which persist in these practices.

---

[14] See *supra*, pp. 30 *et seq.*

V. EXCLUSIVE AFFILIATION

1. Licensee allowed to broadcast programs of only one network

NBC and CBS, by contractual arrangements with their affiliates, prevent the great majority of them from broadcasting programs of any other national network. This restriction hinders the development of other national networks. The evidence is convincing that the purpose, as well as the effect, of exclusive affiliation, is to prevent the growth of other national networks.

Since its first contract in 1927, CBS has had an exclusive affiliation clause designed to obstruct what it calls "wildcat networks." NBC, however, did not adopt its exclusivity clause until 1936, after certain of its affiliates had begun to broadcast Mutual programs. The NBC vice president in charge of station relations testified at the committee hearings:

> At the very outset, this was something which we had assumed, this exclusivity of arrangements between the network and the station. It was something that we didn't think had to be put into writing and it was not until about 1936 that it did become phrased in this particular way, and that was only due to the fact that these exceptions were beginning to grow up where there was not that recognition by the stations of the viewpoint which I have expressed (Hedges, Tr. 1859).

NBC's assumption apparently had not been shared by its affiliates; for a substantial number of them had, in fact, carried Mutual programs. When the rise of Mutual posed the question of exclusivity as a practical problem for the first time, NBC countered with the present exclusivity clause. It is a fair inference that NBC's desire to entrench its position and to hinder the growth and development of a new national network played an important part in the decision to incorporate an exclusivity clause in the standard NBC affiliation contract.

But whatever the purpose of the exclusory clause, there is no doubt as to its effect: At the present time there are 45 cities with a population of more than 50,000 served by NBC or CBS or both to which Mutual cannot obtain any access whatever. In over 20 more, including Cleveland, Indianapolis, Houston, Birmingham, Providence, Des Moines, Albany, Charlotte, and Harrisburg, it can obtain only limited access to facilities. The difficulties facing a new network under these circumstances would be well-nigh insurmountable.

Of the 92 cities of more than 100,000 population, less than 50 have 3 or more full-time stations, even including locals, and less than 30 have 4 or more. Since a national network must have outlets in the more important markets of the country, it is readily apparent that exclusive network affiliation contracts severely limit the number of national networks which may do business.

But figures on the limited number of stations outside the NBC and CBS domain do not fully show the extent of their present dominance. NBC and CBS have, by their exclusive contracts, tied up the largest stations in the most desirable markets. This is evidenced by the fact that of the 30 clear-channel stations in 1938, there were 28 licensed to or affiliated with NBC or CBS; and this dominance of the clear channels is typical of NBC and CBS dominance with respect to high-power regional stations as well. Thus even where stations are available to

a new network, they are, with few exceptions, locals or low-power regionals not able to compete effectively with the superior stations under exclusive contract to NBC and CBS.

As previously noted, there are natural obstacles making the formation and operation of a new network difficult enough at best; the existence and enforcement of exclusive contracts make it practically impossible. Obstacles should not thus be heaped one upon the other. Exclusive contracts, which foreclose the possibility of new networks, deprive the public of the improvement in station program content which could reasonably be expected to flow from competition by new national networks.

In the many areas where all stations are under exclusive contract to NBC or CBS, the public is deprived of the opportunity to hear Mutual programs. Restraints having this effect are to be condemned as contrary to the public interest irrespective of whether it be assumed that Mutual programs are of equal, superior, or inferior quality. The important consideration is that station licensees are denied freedom to choose the programs which they believe best suited to their needs; in this manner the duty of a station licensee to operate in the public interest is defeated. The Mutual programs which the stations would broadcast if permitted freedom of choice are, in these areas, withheld from the listening public. In addition, the very fact that Mutual is denied access to important markets immeasurably restricts its ability to grow and to improve program quality.

Not only is regular Mutual program service banned from large areas, but even individual programs of unusual interest are kept off the air. A concrete example of the manner in which exclusivity clauses operate against the public interest may be seen in the broadcasting of the World Series baseball games of October 1939. Mutual obtained exclusive privileges from the baseball authorities for the broadcasting of the series with the Gillette Co. as commercial sponsor. Thereupon it attempted to obtain time from various stations, including stations which were then under exclusive contract to NBC and CBS. CBS and NBC immediately called upon their outlet stations to respect the exclusive provisions of their contracts. Disregard of this reminder would have jeopardized a station's rights under the contracts. This prevented certain licensees from accepting a program for which they believed there was public demand and which they thought would be in the public interest.[15] It also deprived the advertiser of network advertising service in some areas, and prevented the licensee from receiving income which could have been obtained from acceptance of the program series. As a result, thousands of potential listeners failed to hear the World Series of 1939.[16]

---

[15] In a footnote to its supplementary brief, CBS contends that "Mutual was the real party at fault, if any existed. Columbia offered to have *its* stations carry the broadcast, the sole condition being that *it* not be forced to advertise its competitor, Mutual." [Italics supplied.] Since it is patent that compliance with this condition was impracticable, the offer was a mere gesture. Moreover, this CBS argument assumes that the affiliated stations in some way belong to CBS. The position seems to be that when an affiliate broadcasts a Mutual program, CBS is advertising Mutual. This confuses a broadcast by an affiliate of CBS with a CBS network broadcast. The network has wide latitude to advertise or refrain from advertising anything it pleases on its network programs. But it is the stations which are licensed to utilize the radio facility in the public interest, and they should be free to accept or reject programs which are in the public interest, whether or not CBS approves.

[16] Mutual refused to allow other stations within the territory of Mutual outlets to broadcast the program. This was because of its practice of respecting the territorial exclusivity of its affiliates. *Supra*, p. 36.

Only strong and compelling reasons would justify contractual arrangements which have the results we have described. We turn, therefore, to a consideration of the arguments proffered by NBC and CBS in support of their contention that the exclusivity clauses are necessary to the proper operation of network broadcasting.

NBC seeks to justify exclusivity on the ground that it eliminates "confusion" on the part of the radio audience concerning the affiliation of any particular station and enables the listening audience to know where to turn for the programs of any given network. But it is a well-known fact that audiences are keenly aware of the quality and merit of particular programs and follow their favorite programs from station to station. Numerous ratings of programs show that the power of programs to attract listeners varies widely among programs broadcast over the same station. Indeed, the whole effort to improve programs by spending large sums on talent and material is founded upon the theory that good programs attract large audiences. NBC's chief statistician testified that listening audiences do not stay tuned to a particular station but shift around to hear certain programs:

> It [a survey of listening audiences] merely shows that there are wide shifts of the audience from station to station, depending on programs; that the audience does not stay with any particular station throughout the morning or afternoon; in this case only the morning. There are wide shifts of programs as listening increases and decreases, depending upon the programs that happen to be on. There is no constant level of listening, nor constant level of listening to any one station (Beville, Tr. 418–19).

NBC's fear of listener confusion is apparently not shared by NBC's chief statistician.

A second argument advanced by NBC to justify exclusivity is that network broadcasting is a joint venture in which NBC spends large sums on sustaining programs to build up goodwill for station and network alike. It is urged that it would be unfair to NBC for an affiliated station, by disposing of its time to another network, to trade on the goodwill which has been built up through the broadcasting of NBC programs, and that it would remove the incentive for furnishing good sustaining programs to its affiliates.[17]

For various reasons this line of argument also fails to persuade. If we assume that NBC's incentive for supplying good sustaining programs to affiliates is its desire to build up a listening audience for NBC commercial programs, this does not aid its argument. For

---

[17] "In effect, network broadcasting is a joint enterprise. It is a joint enterprise necessarily because the National Broadcasting Co. has no voice, no articulation without the transmission of its programs by its stations.

"Being a joint enterprise, it creates a goodwill which is enjoyed by both the stations and the network, and for one party to be faithless to the other to the extent that it barters the goodwill which has been built through the broadcasting of NBC programs by disposing of its time to another network is unfair to the National Broadcasting Co. as it would be unfair to any other network having similar affiliations and providing a similar service to its audience, and to the station . . .

"There would be no incentive for the National Broadcasting Co. to continue to serve its stations with such a vast amount of sustaining service if it were reduced to a status of a mere time brokerage, as it would be in the case that a station could play fast and loose with its affiliations between networks" (Hedges, Tr. 1853–54).

"Obviously, if a network spent money, as we are doing, to develop the popularity of an individual broadcasting station in some territory, if we gave them sustaining programs and they attracted a listening audience and they built up circulation, and then some other organization came along that did none of these things, but just had a commercial program, and asked that broadcasting station to take their program and put behind it the goodwill and the circulation and the pioneering that had been done by whoever built that station up, of course, that somebody would have a temporary advantage, but American broadcasting would have a loss" (Sarnoff, Tr. 8521).

this would only give NBC a legitimate interest in seeing that the station did not broadcast poor programs during its non-NBC time. It is hardly to be presumed and, indeed NBC does not contend, that a station given free rein would choose a program from another network less attractive than the program which would otherwise have been broadcast.

The evidence introduced at the committee hearings leads to the conclusion that the elimination of exclusivity will not bring any deterioration in the overall quality of network sustaining programs. Indeed, as an historical matter, NBC supplied its affiliates with sustaining programs for some 10 years before it adopted exclusivity. No attempt was made to show that the introduction of exclusivity improved in any way the quality of the sustaining programs furnished by NBC to its outlets.

Moreover, sustaining programs are not a gratuity; they are sold like any other service.[18] From 1926, when NBC first began broadcasting, until 1935, a period of about 9 years, NBC charged its affiliates for its sustaining programs. CBS during most of the first year of operation also charged affiliates for sustaining programs. But after NBC and CBS abandoned direct payment for sustaining programs, affiliated stations were still required to furnish a valuable *quid pro quo* for these programs. The changed method, which is now in effect, provides that affiliated stations receive no compensation for a specified number of hours of network commercial programs, and reduced compensation for certain additional hours. To the extent of these hours, the network is paid by advertisers but does not have to share its receipts with station licensees. In short, stations pay handsomely for sustaining service, just as they always have done in the past. If NBC and CBS do not supply adequate sustaining programs, we cannot believe that others will not be ready and willing to take their place once the field is opened to them.

As we point out elsewhere in this chapter, the public interest will be better served if networks compete for outlet stations. Such competition undoubtedly will encourage the networks to supply sustaining programs whose good quality will induce stations to carry their commercial programs.

We are driven to the conclusion that the real purpose and function of NBC's exclusivity is to prevent competing networks from making any use of the audiences of its affiliates. But those audiences are not NBC's to use or withhold as it sees fit, even though NBC claims that they were attracted in part by virtue of its sustaining programs. The licensee must remain free to use its time and facilities, when they are not being utilized by NBC, in any way that it sees fit in the public interest. No station should be permitted to enter into an exclusive agreement which prevents it from offering the public outstanding programs of any other network or hinders the entrance of a newcomer in the field of network broadcasting.

Finally, it is broadly argued by NBC that the elimination of exclusivity will destroy the entire fabric of network broadcasting. "Destroy that provision," stated the chairman of the board of NBC, "and you will have destroyed the American system of network broadcasting." These forebodings are in strange contrast to the words of a

[18] *Supra*, pp. 37–44.

former president of NBC who testified that NBC "holds its network stations together only by the superiority of its network program service and by the demand of listeners for NBC network programs".[18]

The testimony of NBC's chairman must also be read in the light of his statement that he did not believe in competition between networks for stations. He testified: "The competition, it seems to me, is in the program end, rather than in the facility end, and this is as it should be." We cannot agree that so essential a factor in the operation of a network—the number and character of the affiliated stations which are its customers—should be removed from the field of competition. We cannot agree that the field should be forever limited to the present incumbents.

The president of CBS contends that the freedom of an affiliate to broadcast the programs of any network might be a stimulus for what he called "wildcat" networks operated by "opportunists who would have no permanent investment":

> If Columbia continued to have a call on station time but didn't have the exclusivity clause, the station could take the program from any network and that might be a stimulus for the so-called wildcat network.
>
> * * * * * * *
>
> I believe that if the present system were disturbed there would develop a class of opportunists who would have no permanent investment, who might have their office in their hat, who would be competing for temporary affiliations, with the result that the important elements of responsibility and reliability and high standards would be seriously impaired to the detriment of the public (Paley, Tr. 3464, 3465).

Obviously, CBS' exclusivity clause, assertedly designed to prevent "wildcat" networks, would as effectively preclude the competition of responsible networks. Indeed, CBS has a far greater stake in precluding the establishment of responsible networks which could offer real and continued competition to it than it has in barring the door to newcomers lacking in reliability. Their deficiency in this respect would bring their quick exit.

It is interesting to note that in another connection, in arguing that the rate of return upon its invested capital was not too high, CBS took a very different position on the importance of capital in network broadcasting. The brief states: "Broadcasting, as any other advertising enterprise, is a service business, the value of which is not dependent upon or determined by the value of the tangible assets devoted to the business."

The president of CBS also testified that there was no reason for organizing another network because a new network could not do any better than CBS was doing:

> I cannot see any advantage in organizing something new which I do not think would have any particular advantages or could do a particular job in any better fashion than we can do it. I don't think the public interest is involved just because two people happen to supply a service as against having one person supply an adequate service, especially since by having the one person supply the adequate service we can have greater solidity and permanence of the very thing he is trying to build up (Paley, Tr. 3556).

This attempted justification of exclusivity, however, fails to take into account the function of competition in our economy. CBS programs may be good; they are not perfect. CBS has not been granted an exclusive franchise to engage in network broadcasting; it has no

---

[18] *Supra*, p. 49.

right to exclude others from the field on the ground that it is already furnishing adequate service to the public, or on any other ground. Competition is in the public interest not because the particular service offered by a new unit is better than the existing service, but because competition is the incentive for both the old and the new to develop better services.

Both large network organizations also contend that, were it not for exclusivity, the station in each community with the best coverage would get all the superior programs; the less favored stations would get only the leftovers. As a result, they argue, existing inequalities in facilities would be accentuated and effective competition by the small stations rendered impossible. This solicitude for the smaller station is not easy to reconcile with the NBC and CBS policy of tying up the best possible stations in a city and refusing their programs to the smaller stations. The contention comes with little grace, too, from network organizations whose restrictive practices have tended to prevent the rise of new networks which might supply these less favored stations with programs.

Nor do we believe that the elimination of exclusivity will have the predicted results. On the contrary, its elimination should lead to an increased number of networks and, consequently, a larger supply of available network programs and a wider latitude for all stations in obtaining network programs. Then, too, there should be a gain in quality as well as quantity as a result of increased competition among networks for the time of outlet stations. Not only the more powerful stations, but those with less desirable facilities, and the public as well, will benefit.

From a practical standpoint, this contention by the networks overlooks the highly important matter of cost of time. The large stations in each city cannot monopolize the best commercial programs unless the advertising sponsors are willing to pay the higher rates charged by such stations. A great variety of factors will affect the sponsors' decisions on this matter. To be sure, if a sponsor desires effective coverage of all his best markets on a national scale, he will not be content with a network of low-power stations; as we have seen, the fact that NBC and CBS have tied up the best facilities in every important market has been the main obstacle to other networks. But in determining precisely how many high-powered stations should be purchased, each sponsor will want to consider, in the light of his radio advertising budget, such matters as the geographical location of each station in relation to his merchandising problem, its ratio of urban, suburban, and rural listeners, the income status of its audience, and numerous other such matters. Facilities highly desirable for one advertiser may be wasteful for others.

A glance at the network rates for these big stations is sufficient to show the importance of the cost factor. In Louisville, Ky., for example, there are four stations: a 50-kilowatt clear-channel station affiliated with CBS, a 5-kilowatt regional station affiliated with NBC's Red network, and two low-powered local stations, one of which is affiliated with Mutual and the other with NBC's Blue network. The full-hourly rate for the local station is, in each case, about $120; for the regional station, $200; and for the big station, $475. Clearly, the big station will not be able to draw commercial programs away from the regional station unless the sponsor is willing to pay well over

twice as much for the privilege. An advertiser who has been utilizing one of the local stations would have to quadruple his payments.

Applying the same test on the basis of some 25 cities suitable for a "basic" network, and of a 52-week program series, the results speak even more eloquently. If, in each of those cities, the program series were to be furnished to the most powerful station, the cost to an advertiser would apparently exceed by roughly $50,000 the cost of using the CBS or the NBC Red networks. If, in addition, the advertiser wished to cover the dozen or so cities which have 50-kilowatt stations but which are not included in any basic network, the advertiser would pay, for a 52-week series, roughly $37,000 more if he used the 50-kilowatt station in each city than if he used the CBS or NBC Red network stations in those cities.

Perhaps, in some cases, an advertiser will be willing to pay the additional amounts required to secure an unusual number of large stations for his program. But it is also likely that, in other cases, advertisers will seek to lower their costs by using fewer high-powered stations. The elimination of exclusivity, accordingly, seems likely to introduce a greater amount of flexibility into the situation by giving advertisers a wider range of choice with respect to rates and coverage.

Finally, if the dominant stations should take commercial programs during the more desirable broadcasting hours to the exclusion of public service programs, they would undermine their own position. Degeneration in the quality and variety of their programs might cause them to lose listeners, and bring about a weakening of their competitive commercial situation. Furthermore, stations enjoying the benefits of a public license have an obligation to render the public its due in the form of the best program service that the capital and intelligence of the licensee permits. This obligation is particularly clear where the license authorizes the use of high power, with the concomitant benefits of coverage, opportunity for profit, and exclusion of others from the spectrum. Accordingly, such tactics would render the dominant stations vulnerable to applications for their facilities by other stations or persons willing to furnish a better-rounded service.

Our conclusion is that the disadvantages resulting from these exclusive arrangements far outweigh any advantages. A licensee station does not operate in the public interest when it enters into exclusive arrangements which prevent it from giving the public the best service of which it is capable, and which, by closing the door of opportunity in the network field, adversely affect the program structure of the entire industry.

2. Network allowed to send programs to only one station

Hitherto we have dealt only with exclusivity of affiliation which obligates an outlet to broadcast the programs of only one national network. The correlative of this exclusivity is territorial exclusivity, whereby the network agrees not to transmit its programs to any other station in the "territory" of an existing affiliate.

The NBC vice president in charge of station relations testified that fidelity of the network to the station as well as of the station to the network is inherent in the American system of network broadcasting. He testified further that about the same principles apply to territorial exclusivity as to exclusivity of affiliation. He added, however, that

NBC had granted territorial exclusivity as a matter of contract right in only a few cases. Such exclusivity is granted to a station most reluctantly by NBC, and only after what he characterized as a "knock-down and drag-out fight," because, according to the witness, "the less restrictions that we have upon us are always to be preferred." There is no evidence in the record, however, that NBC ever sends its programs to other stations in the same area as its outlets, and the testimony of NBC's chairman would indicate that it does not.[19]

CBS, on the other hand, regards fidelity of the network to the station more rigorously. In the very provision of its affiliation contract which makes its affiliates exclusive CBS outlets, the affiliate is granted protection against the competition of CBS programs from other stations:

> Columbia will continue the station as the exclusive Columbia outlet in the city in which the station is located and will so publicize the station, and will not furnish its exclusive network programs to any other station in the city, except in case of public emergency.

Mutual grants its associated stations territorial exclusivity. At the time of the committee hearings, five organizations, including the Don Lee regional network, were given this protection against competition in their affiliation contracts; and, as a matter of practice, Mutual affords similar protection to its other outlets.

The question of territorial exclusivity is an important one because, among other reasons, network affiliates take only some of the programs offered them by the networks. With few exceptions,[20] stations may select freely from among the sustaining programs of their respective networks those that they want to broadcast, and reject the others. An affiliate may reject a sustaining program because of its quality, or because it does not fit the program structure for a given day, or for any reason whatsoever. The affiliate's right to reject network sustaining programs is not restricted in the same way as its right to reject network commercial programs.[21]

Territorial exclusivity arrangements are important from the point of view of over-all program structure. To be sure, usually it would be wasteful duplication of service for a network simultaneously to send identical programs to stations whose service areas approximately coincide. If the only effect of territorial exclusivity were to prevent duplication, no fault could be found. But exclusivity goes much further; it protects the affiliate from the competition of another station in the same area which may wish to use network programs not carried by the affiliate.

Under territorial exclusivity, programs rejected by affiliates, sustaining or commercial, may not be offered by the network to other stations in the service area of the affiliate which rejects the program. An example of the adverse effect this may have upon the public is given in a brief filed August 7, 1940, by station WBNY at Buffalo, N. Y.[22]

---

[19] In answer to the question: "Do you think it equally sound to say that the network ought to obligate itself to the station to render service exclusively to that station in the area which is served by that station?", the chairman of the board of directors of NBC said: "I think so, except where it is known to be rendering service to another station, where it is known in advance that it does so; but, by and large, I should think that that obligation ought to be reciprocal; yes" (Parnoff, Tr. 8522).

[20] *Supra*, p. 40.

[21] *Supra*, p. 38.

[22] The facts set forth by WBNY were not controverted by any party at the oral argument or in the supplementary briefs.

WBNY related that Mutual outlets in Buffalo rejected a sustaining program series known as "The American Forum of the Air," but that its efforts to obtain this program were futile. Consequently, this worth-while program was not broadcast to the Buffalo area despite the desire of WBNY to carry it.

It is not in the public interest for the listening audience in an area to be deprived of network programs not carried by one station where other stations in that area are ready and willing to broadcast the programs. It is as much against the public interest for a network affiliate to enter into a contractual arrangement which prevents another station from carrying a network program as it would be for it to drown out that program by electrical interference.

This is not to say, of course, that all programs not carried by an affiliate must be offered to all other nearby stations. Nor need sustaining programs be offered free of charge. Suitable arrangements for compensating networks for sustaining programs and stations for commercial programs will be arrived at between the parties. The crucial point is that it is not in the public interest for a station licensee to enter into an arrangement with a network to preclude other stations in the area from broadcasting network programs which it rejects.

B. LONG-TERM AFFILIATION CONTRACTS

Another way in which the national networks obstruct the growth of new networks is by means of long-term contracts with their affiliated stations.

The standard NBC affiliation contract is for a term of 5 years with the right granted to NBC, but not to the station, to terminate the contract upon a year's notice. The record in this proceeding shows that the purpose of the 5-year term is to prevent the affiliates from becoming affiliated with another national network. Perhaps the most conclusive evidence is the fact that the term of the NBC contracts was changed from 1 year to 5 in 1936, soon after Mutual was launched. According to the NBC vice president in charge of stations relations, NBC adopted the 5-year plan because competitors were taking away its stations and NBC wanted to keep its network intact:

> Our present contracts run up to 5 years. The reason for that was simply this. With a contract of this nature, which I have just described, where a station may cancel upon a year's notice, we were exposing ourselves to our competition. Our competition, so we were informed, were perfectly willing to sit down and negotiate contracts with such of our affiliates as they desired and bide their time for the year to elapse before they could take over the stations.
>
> It seemed rather poor business for us to leave ourselves in such a vulnerable position and for that reason we decided to further stabilize our business and to stabilize the network business not only for our own benefit but for the benefit of all those affiliates associated with us, by retaining the network in as intact order as was possible subject, of course, to the individualities that were involved and whose individual determinations in each case might induce further change within the network. For that reason, we adopted a 5-year plan (Hedges, Tr. 1819-20).

Furthermore, the change that occurred in 1936 affected only the obligation of the station, but not that of NBC. NBC retained the right, upon 12 months' notice, to terminate the contract with or without cause. NBC's contractual obligation was thus limited to a single year. There was no effort to stabilize the network-affiliate relation-

ship on a 5-year basis. The new contract was clearly an effort to tie up the station for 5 years, if the network wanted to utilize it that long.

There was some testimony and argument to the effect that long-term contracts are indispensable to stable and efficient network operations, because NBC itself has certain long-term commitments. The argument is made in NBC's original brief that it entered into leases for studio space and invested large sums in equipment on the strength of these 5-year contracts, which would not have been done without contractual assurance that these studios would be useful for more than 1 year.

Analysis of the evidence shows that this contention is in the nature of an afterthought. From 1927 to 1938 NBC built 17 studio plants at a total cost of $7,719,200. Eleven of these seventeen studio plants, built at a cost of $5,519,700, or 71 percent of the total, were completed prior to 1936, while the term of the NBC affiliation contract was still only 1 year.

Nor is NBC's argument as to the need for long-term contracts consistent with its declared policy of "flexibility" in its dealings with the stations. NBC may decrease the network station rate of any one of its affiliates upon 90 days' notice if at the same time it reduces the rates of a majority of its affiliates; it may increase the network station rates of its affiliates; and it may terminate any of its affiliation contracts on 12 months' notice. NBC insists upon those rights on the ground that the network business is dynamic and ever changing, and that NBC must be in a flexible position at all times:

> This clause gives to NBC a degree of flexibility in respect to rates which is absolutely essential to meet any possible general reduction which might be made by other advertising media.
>
> It must be remembered that the depression, recession or whatever you want to call it, is still upon business generally although there has been some upturn. Nevertheless, when you are with stations for a period so long as 5 years, there is no telling what may happen and if a depression were to suddenly come about it might be very necessary in order to keep the network functioning as a national advertising medium to reduce those rates to meet the competition of national magazines or other media which advertisers may employ for national advertising purposes (Hedges, Tr. 1824).

However, NBC failed to give any reason why the network-affiliate relationship should be dynamic for the purpose of giving NBC flexibility but static for the purpose of binding the affiliates for long periods of time.

NBC also contends that network-outlet contracts for a single year are impractical for the reason that a national advertiser's use of broadcasting is quite different from a spot announcement which a local merchant may buy in an effort to find immediate customers. It is pointed out that the most important return which any national advertiser secures from his expenditures in broadcasting is the goodwill of listeners resulting from attractive programs over the same stations for a period of years. It is urged that national advertisers must have some reasonable assurance that the same stations will be available for several years, or they may be expected to take their advertising to other media which can assure continuity.

The evidence in the record fails to support this contention. The NBC vice president in charge of sales testified that NBC does not make any commitments with advertisers for a period longer than 1 year

because it is difficult in the broadcasting business to determine what the situation will be after a year:

> We do not make commitments beyond 52 weeks because it is pretty difficult in this business to determine exactly what the situation would be after a year and we do not want to commit ourselves beyond a year. We don't know what new regulations may develop; what we may find it necessary to do. This radio business has changed pretty rapidly since it started, and we always want to be in the flexible position, as far as we are concerned, so that we can make any necessary moves, and we don't want to be cramped by longer than 52-week contracts (Witmer, Tr. 2166-2167).

This testimony shows conclusively that NBC does not give advertisers any assurance that they may use its facilities beyond a period of 1 year.

To summarize, NBC does not believe that there should be competition between networks for outlet stations, and adopted the 5-year affiliation contract for the purpose of precluding such competition. NBC's chairman testified that, if contracts with affiliates were for 1 year instead of 5, the stability of networks would be seriously affected; for there would be competition between the networks for stations. He said that the competition was, and should be, in programs rather than in facilities.[23]

The term of the standard CBS affiliation contract, like that of the NBC contract, is for 5 years. CBS, but not the station, may terminate it upon 1 year's notice. As evidence of a viewpoint similar to that of NBC, note should be taken of the following testimony of the CBS vice president in charge of station relations:

> It has been my personal experience that a length of time up to 5 years has been the practical period of time (for ter.) of affiliation contracts) because should there be a year-to-year situation you would be continually renewing and renegotiating and renewing contracts, and you would also be *vulnerable from a competitive standpoint* (Akerberg, Tr. 3719). [Italics supplied.]

The long-term contracts of CBS and NBC were intended to, and do, prevent any real competition in the network-station market. The public is thus deprived not only of the advantages that might flow from the establishment and development of new networks, but it also loses the benefits of competition between existing networks for the better outlets.

Regardless of any changes that may occur in the economic, political, or social life of the Nation or of the community in which the station is located, CBS and NBC affiliates are bound by contract to continue broadcasting the network programs of only one network for 5 years. The licensee is so bound even though the policy and caliber of programs of the network may deteriorate greatly. The future necessities of the station and of the community are not considered. The station licensee is unable to follow his conception of the public interest until the end of the 5-year contract.

---

[23] Q. "If your contracts with your affiliated stations were for, say, a year instead of 5 or more years, do you think that that would materially affect the stability of the networks?"
A. Yes; I think so, only materially but seriously."
Q. "Well, now, just how? When the contracts expire I suppose that there would be competition with the other networks for that affiliation?"
A. "There would be competition for the stations, competition between the networks, and since a network, in order to exist, must have certain stations on its network, the local stations would then deal with the highest bidder, and other questions would become subsidiary to that, and there would be a continuous battle back and forth to obtain the more desirable stations on these networks. That would throw the whole structure into a state of confusion. A year does not mean very much. The listener also has become accustomed to dialing to his favorite station on a certain network, and he would continually find that he would have to dial elsewhere. *The competition, it seems to me, is in the program end, rather than in the facility end, and this is as it should be*" (Sarnoff, Tr. 8542). [Italics supplied.]

The option of CBS and NBC to terminate the contract upon a year's notice, without a correlative option in the affiliate, gives the network the whip hand over the outlet. Such an arrangement is lacking in mutuality.

In general, Mutual's contracts with its affiliated stations permit both parties to cancel their affiliations after the first year, upon a year's notice. The contracts between Mutual and its seven stockholders, however, are for a 5-year period, but give to those stockholders, rather than Mutual, the privilege of cancelation upon a year's notice at any time after the first 2 years.

We conclude that long-term network affiliation contracts remove the choice outlets from the network-station market and thus prevent the establishment and development of new networks; that, under such contracts, stations become parties to arrangements which deprive the public of the improved service it might otherwise derive from competition in the network field; and that a station is not operating in the public interest when it so limits its freedom of action.

We are supported in this view by the fact that Congress has foreclosed vested rights in the field of radio broadcasting. Congress also provided that no radio station should be licensed for more than 3 years; licenses issued by the Commission in fact run for only 1 year. While the network-outlet contract is necessarily contingent upon the Commission's granting license renewals, we nevertheless conclude that, as a matter of policy, no radio station should even partially or contingently bind over its facility to a network for as long a period as 5 years.

With respect to the maximum term of the contract, no showing has been made that there is any business need for an affiliation contract longer than 1 year. On the contrary, competition will be strengthened if opportunity is provided for annual readjustments on the basis of comparative showings of networks and stations. We conclude, therefore, that station licensees will best serve the public interest if they refrain from entering into such contracts for periods in excess of 1 year and hold themselves free to negotiate with networks annually.

C. NETWORK OPTIONAL TIME

At the time of the committee hearings, both NBC and CBS had network optional time provisions in the affiliation contracts with their outlet stations. Mutual entered into similar arrangements with its 7 stockholders early in 1940, covering some 50 stations owned or operated by the stockholders or affiliated with their regional networks.

Upon 28 days' notice NBC may call upon its outlet stations to carry a commercial program during any of the hours specified as network optional time. This covered the entire broadcast day for 29 outlets of NBC in the far west and, for substantially all the rest of its affiliated stations, 8½ specified hours on week days and 8 specified hours on Sundays. Three and a half evening hours are included each day, and 4 evening hours on Sunday. The evening hours between 8 and 11, which are included within the NBC option, are the most profitable and valuable of the broadcast day.

In spite of the fact that it optioned such substantial periods of time, in 1938 NBC used for network commercial programs only 58.1 percent of the optioned time of stations on the basic Red network, and only 19.4 percent on the basic Blue network. The percentages, of course, would be far smaller if figures for all the supplementary stations were included, because the basic stations, located in the important markets and usually available to advertisers only as a group, carry far more network commercial programs than the supplementary stations.

NBC affiliates may utilize the optioned time only subject to 28 days' notice that NBC wants that time. This limits severely their ability to sell their own time. The NBC vice president in charge of sales testified that 13 weeks is the minimum time necessary for an advertising campaign to take hold:

> We feel in radio a new advertiser is likely not to feel the benefits of his radio advertising until he has been on the air a considerable length of time. It depends upon the circumstances. It may be necessary for him to be on 26 weeks before he begins to get a real lift from his radio advertising. He may be on only a matter of a few weeks; one program may give him a tremendous reaction. It all depends upon the circumstances, but by and large we feel that 13 weeks of radio advertising is about the minimum from which an advertiser can expect to get results (Witmer, Tr. 2165-2166).

To the extent that, and in the field where this is true, the provision for option time would make it impossible for the stations themselves to make any effective contracts for advertising programs.

To be sure, it is less difficult to shift the time of a local commercial program involving only one station than that of a network commercial program. Nevertheless, shifting a local commercial program may seriously interfere with the efforts of a sponsor to build up a regular listening audience at a definite hour, and the long-term advertising contract becomes a highly dubious project. This hampers the efforts of the station to develop local commercial programs and affects adversely its ability to give the public good program service.

NBC's time options likewise affect the ability to serve the public interest of those few of its affiliated stations (not subject to an exclusivity clause) which are affiliated also with Mutual. As of January 17, 1939, 25 NBC stations also served as outlets of Mutual. NBC's contractual right to utilize the time of these stations on 28 days' notice gives it the whip-hand over any other network broadcasting over these stations. Mutual's general manager gave testimony as to how this works out:

> For an example, a program would be developed to go on three radio stations at a particular hour. It would become a popular program; they would want to expand the program; we would find ourselves in the position of say, [sic] "If you desire to expand the program, we must provide certain facilities, subject to 28 days' notice." Some one else in direct solicitation of the same thing said, "We can supply either a different facility, either a better facility, or in many instances, the same facility where we can guarantee the time to you." We lost through our faults, we lost Lucky Strike. We could go through a number of specific things which we lost in the development.
>
> Now in analyzing that and while we realize that we are going to continue to grow and do the things which aggressive operation is expected to do, you do reach a certain point where people begin to understand the relative function which you can perform. As of today the function that we can perform is understood to be partially restrictive (Weber, Tr. 5193-94).

This uncertainty in the availability of NBC's affiliates to other networks places a serious obstacle in the way of the development of new

networks. Few sponsors are willing to spend large sums in building up a program series to be broadcast over a definite number of stations at a certain hour if some of the important stations are subject to withdrawal upon order of a dominant network. Stability for NBC cannot be justified if attained at the cost of instability on the part of NBC's competitors and of their consequent inability to expand and provide the radio listening audience with effective program service.

NBC's optioning of time has an even more adverse effect upon the broadcasting of national spot commercial programs by means of transcriptions. The NBC exclusivity clause does not apply to transcriptions, but the optional-time provision does. The fact that transcription broadcasts, which fall within the periods optioned to NBC, can only be scheduled subject to a 28-day call by NBC, is a serious obstacle to obtaining sponsors for such programs. Like sponsors of other programs, they endeavor to build up regular listening audiences and this takes longer than 4 weeks. By keeping a 4-week call on the best time of its affiliates, NBC renders transcription programs a less effective competitor.

The CBS optional-time provision restricts the outlet stations even more than does that of NBC. While NBC optional time for most of its outlets covers 8 or 8½ specified hours per day, CBS optional time covers the entire broadcast day. Upon 28 days' notice CBS may call upon its outlet stations to carry a network commercial program at any hour.[24] This has the same restrictive effect upon other types of programs broadcast by CBS affiliates as does the NBC optional-time provision. Notwithstanding these disadvantages from the optioning by CBS of all the time of its outlets, CBS during 1938, used for commercial programs only 39 percent of the optioned time of its basic network stations.

Only five CBS affiliates were, as of January 1939, outlets of Mutual as well. The optioning of time by CBS restricts the broadcasting of Mutual programs over these five stations. Upon the elimination of the CBS exclusivity clause, the restrictive effect of the present optional-time provision upon the development of new networks would be apparent at once. Indeed, as a practical matter, it is not unlikely that, even if exclusivity as such were eliminated, the present network optional-time provisions would, unless likewise eliminated, perpetuate exclusivity.

From the time of its organization in 1934 until 1940, Mutual did not option any of the time of its associated stations. Early in 1940, however, Mutual entered into optional-time arrangements with its seven stockholders. These arrangements are less inclusive than those of NBC and CBS in that they cover only 3¼ to 4¼ specified hours on weekdays and 6 specified hours on Sundays and apply to only about half of the stations associated with Mutual. The contracts expressly provide that the optional-time provision shall lapse if the Federal Communications Commission prohibits that practice or the other national networks voluntarily abandon it.

---

[24] The one limitation on the right of CBS to call upon its stations for time for network commercial programs is that a station is not obliged to broadcast more than 50 converted hours of network commercial programs during any particular week. But this limitation has had no practical effect whatsoever. At the time of the committee hearings no CBS outlet had ever carried as many as 50 converted hours of network commercial programs in any 1 week.

NBC and CBS argue that some form of time optioning is indispensable to network operation because broadcasting competes with other advertising media, such as newspapers and magazines, which are free to guarantee to advertisers definite coverage in terms of time, space, and circulation. But firm commitments and guarantees for broadcast advertising are not dependent upon time options. Historical analysis shows that the networks did not institute time options to protect themselves against competition from newspapers or magazines. NBC adopted optional-time provisions because CBS had already done so and was thereby deriving a competitive advantage. NBC's vice president in charge of station relations testified:

> At least one of our competitors [CBS] was in a much more fortunate position in that respect, having a substantial number of contracts, so we understand and believe, which enabled it to secure right of way at any time of the day or evening. Of course that made it possible for the competitor to tell one of our clients who was dissatisfied with the inadequate network turned up, as a result of our availability requests, that he was in a position to deliver complete coverage and he would show the list of stations. As a result, we have lost considerable business (Hedges, Tr. 1722-1723).

Similarly, in 1940 Mutual adopted a number of optional-time provisions in its more important contracts in order to compete with the other national networks.

A station licensee must retain sufficient freedom of action to supply the program and advertising needs of the local community. Local program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community by broadcasting such outstanding local events as community concerts, civic meetings, local sports events, and other programs of local consumer and social interest.

We conclude that national network time options have restricted the freedom of station licensees and hampered their efforts to broadcast local commercial programs, the programs of other national networks, and national spot transcriptions. We believe that these considerations far outweigh any supposed advantages from "stability" of network operations under time options. We find that the optioning of time by licensee stations has operated against the public interest.

The fact that NBC was able to carry on its business for 7 years without time options, and changed only when CBS began to derive a competitive advantage from its time options, as well as the somewhat similar experience of Mutual, lead us to the conclusion that time options, with their restraint upon the freedom of licensees, are not an essential part of network operations. With all the networks operating on an equal footing, the absence of optional time as it now exists will not, we believe, hamper network operations or drive advertisers to other media.

D. REJECTION OF NETWORK PROGRAMS

While station rejection of network programs is not solely a problem of competition, its close relation to optional time and its general importance as an element of network broadcasting require its consideration.

It was noted in the preceding chapter that most NBC and CBS affiliates are required to take network commercial programs unless such

programs are not in the public interest.[25] NBC even goes so far as to require that the licensee "be able to support his contention that what he had done has been more in the public interest than had he carried on the network program." Thus, the burden of proof is placed upon the licensee.

Practical difficulties confront a licensee who conscientiously seeks to carry out his duty to furnish the public with the best available programs. Precise information concerning the program the network proposes to distribute is not usually furnished and is not always easy to furnish. If, in addition to this obstacle, the licensee is not allowed to reject a program unless he can prove to the satisfaction of the network that he can obtain a better program, his efforts to exercise real selection among network programs become futile gestures, and he soon proceeds to broadcast network programs as a matter of course. The limitation on the right of rejection contained in the NBC and CBS contracts removes the licensee's incentive to find out what the network program is going to be.

It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency. He cannot lawfully bind himself to accept programs in every case where he cannot sustain the burden of proof that he has a better program. The licensee is obliged to reserve to himself the final decision as to what programs will best serve the public interest.

We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.

Even after a licensee has accepted a network commercial program series, we believe he must reserve the right to substitute programs of outstanding national or local importance. Only thus can the public be sure that a station's program service will not be controlled in the interest of network revenues.

These are principles of general application based on sections 301, 309, and 310 of the Communications Act. They apply to stations receiving programs from national networks, from regional networks, or from any other person engaged in supplying programs.[26] The licensee himself must discharge the responsibilities imposed by the law.

E. NETWORK OWNERSHIP AND OPERATION OF STATIONS

At the present time, NBC is the licensee of 2 stations each in New York, Chicago, Washington, and San Francisco, 1 in Denver, and 1 in Cleveland, or 10 stations in all. CBS is the licensee of 8 stations, 1 in each of the following cities: Charlotte, Minneapolis, St. Louis, Los Angeles, Chicago, Washington, New York, and Boston. Mutual has never owned any stations. At the time of the committee hear-

[25] *Supra*, pp. 38–39.

[26] See, in this connection, *Applications of Westinghouse Electric & Manufacturing Co. for Renewals of Licenses*, Docket Nos. 5823, 5824, 5825, and 5826, September 4, 1940.

ings, however, Mutual was owned by the licensees of stations WGN at Chicago and WOR at Newark. In January 1940, as previously set forth,[27] stock in Mutual was issued to 5 additional affiliates.

The 18 stations presently licensed to NBC and CBS are among the most powerful and desirable in the country. Of the 25 I–A clear-channel stations in the country, NBC and CBS are the licensees of 10. They are located in the largest and richest markets and their station rates, time sales, and revenues are among the highest for all stations.

Long-term affiliation contracts, with their exclusivity and optional-time provisions, seriously interfere with competition among networks. Ownership of broadcast stations by networks, however, goes even further. It renders such stations permanently inaccessible to competing networks. Competition among networks for these facilities is nonexistent, as they are completely removed from the network-station market. It gives the network complete control over its policies. This "bottling-up" of the best facilities has undoubtedly had a discouraging effect upon the creation and growth of new networks.

Furthermore, common ownership of network and station places the network in a position where its interest as the owner of certain stations may conflict with its interest as a network organization serving affiliated stations. In dealings with advertisers, the network represents its own stations in a proprietary capacity and the affiliated stations in something akin to an agency capacity.[28] The danger is present that the network organization will give preference to its own stations at the expense of its affiliates.[29]

Assuming that the question were presented as an original matter at this time, the Commission might well reach the conclusion that the businesses of station operation and network operation should be entirely separated. However, this Commission and its predecessor, the Federal Radio Commission, have heretofore approved as in the public interest the acquisition by NBC and CBS of most of these owned or operated stations and have periodically renewed the licenses of such stations. From a legal standpoint these circumstances confer no vested rights upon NBC or CBS, but we think it inadvisable to compel these networks to divest themselves of all of their stations.

In New York, Chicago, and Los Angeles or San Francisco, network operations have become so interwoven with station ownership that we do not deem it in the best interests of radio broadcasting to divorce the two at this time. Stations in these "key" cities make available a substantial minimum audience for network sustaining programs and

---

[27] *Supra*, p. 28.

[28] Owned or controlled stations have been far more profitable per unit than affiliated stations (*supra*, p. 33). This, however, does not necessarily indicate that there has been preferential treatment, since owned or controlled stations are, in general, high-power stations located in lucrative markets.

[29] CBS argues that the ownership of key stations by networks is essential as a reserve source of financing for network sustaining programs in the event network business should recede for a substantial period. It is pointed out in this connection that one of the paradoxes of the radio business is that when advertising revenue falls, the expense of servicing a network rises. It is true that the stations owned and operated by CBS have been extremely profitable, and to that extent they have strengthened the financial position of CBS. But the CBS network business has also been extremely profitable. As early as 1930, CBS had a net income of almost a million dollars, although it owned only two stations. The CBS network has not required any reserve for financing its network sustaining programs, and it is extremely unlikely that its owned stations could furnish such a reserve; for in the event that broadcasting fell on hard days and network income did recede, station income would no doubt similarly recede. Thus investments not dependent on broadcasting revenues would operate as a far more stabilizing factor than investment in stations.

enable the networks to make provision for adequate studios and other facilities on an economic basis at talent centers. They permit the networks to experiment with new techniques of program production and new ideas in program content and balance, and give assurance that the experiments will have a fair test over good facilities. In the light of these conditions and the fact that there exists in these cities the largest supply of stations, we do not deem it advisable to prohibit a national network organization from being the licensee of one station in these "key" cities.

Different considerations apply to other stations licensed to NBC and CBS. We do not believe, for example, that any substantial justification can be found for NBC's operation of two stations in New York, Washington, Chicago, or San Francisco. In none of these cities are the better radio facilities so numerous as to make it in the public interest for any one network organization to control two stations; in each case such dual ownership is bound to obstruct the development of rival networks and the establishment of new networks. In Washington (excluding local stations) there are but three regional stations, of which NBC controls two, and one clear-channel station, which is owned by CBS. In Chicago, the equivalent of two of the four 50,000-watt full-time facilities are owned by NBC,[30] and one by CBS. In San Francisco, the only two stations with better than regional power are NBC's. Competition will be greatly strengthened if the best facilities in important cities are not so tied in the hands of a single network organization. Even in New York, where desirable facilities are more plentiful, NBC's ownership of two clear-channel stations gives it a dominant position which tends to restrict competition on even terms from other networks.

We find, accordingly, that the licensing of two stations in the same area to a single network organization is basically unsound and contrary to the public interest. In any particular case, of course, networks will be given full opportunity, on proper application for new facilities or renewal of existing licenses, to call to our attention any reasons why the principle should be modified or held inapplicable.

In several cities where NBC or CBS owns one station, the available facilities are so few and of such unequal coverage that network ownership is undesirable. In Cleveland, a most important radio market, the only broadcasting facilities are one clear-channel station (owned by NBC), two full-time regionals, and one part-time regional. Charlotte, N. C., has but two stations, one of which is a 50,000-watt station owned by CBS. It seems clear that no network ownership whatsoever should be allowed in either of these cities. In several other cities, such as Denver (NBC), Minneapolis (CBS), and Washington (NBC and CBS), the available facilities are somewhat more plentiful, but the disparity among the facilities raises serious doubts whether any network ownership should be permitted. We find that it is against the public interest for networks to operate stations in areas where the facilities are so few or so unequal that competition is substantially restricted.

---

[30] There are five 50,000-watt stations in Chicago, but two of them (WENR and WLS) share time. NBC owns WMAQ and WENR. WENR is authorized to utilize the great majority of the valuable commercial hours. From Monday to Friday, WENR utilizes the time from 3 p. m. to 6:30 p. m., and from 8 p. m. on. On Saturday, WENR utilizes the time from 3 p. m. to 6:30 p. m., and on Sunday, from noon until 7 p. m., and from 8 p. m. on.

NBC and CBS have such competitive advantages over any actual or potential rival that no additional stations should be licensed to either and they should be required to dispose of some of the stations now licensed to them. We do not, however, deem it advisable to specify at this time a precise maximum figure for network ownership.

In exercising our licensing powers with respect to the renewal of the licenses now held by NBC and CBS, we propose to consider the applicability of the two principles hereinbefore set forth. Subject to the right and opportunity of CBS and NBC to show at hearing in a particular case that public interest requires otherwise, the Commission will not license to a single network organization more than one station within a given area, nor will it license stations to any network organization in communities where the available outlets are so few or of such unequal desirability as to require that all facilities be open to competition among networks for outlets and among stations for networks. In considering methods of divorcement, we will seek to ensure that the divorce of stations from networks shall be actual as well as formal, and will permit the orderly disposition of properties.

Mutual presents a somewhat different problem. The network corporation itself does not own or operate any stations; however, the stock of the network corporation is owned by various station licensees. This difference has several important practical aspects. To begin with, the licensees which own Mutual are not under common control and, therefore, there is no concentration of ownership or control of radio facilities in any one organization. Likewise, and probably more important, the network cannot control its owners; on the contrary, it is controlled by them. The stations which own Mutual can terminate the ownership relation by disposing of their stock. The choice in the case of Mutual is with the station, rather than with the network as in the case of NBC and CBS.

However, the foregoing does not completely solve the problem. The licensees which own Mutual have an interest in the network which tends to cause them to prefer Mutual programs over those of other networks. The judgment of licensees in making a choice among available programs should not be subject to distortion by such extraneous considerations. Under some circumstances, therefore, licensee ownership of networks might be subject to serious objection. However, there seem to be at least two reasons for not taking action in this connection at the present time. First, the three substantial interests in Mutual (25 percent each) are held by station licensees in New York and Chicago and a regional network (Don Lee) on the Pacific Coast which controls four California stations. Thus, the dominant interests in Mutual roughly parallel the direct ownerships of NBC and CBS which this report does not seek to disturb. Secondly, Mutual does not own studios, station facilities, or any substantial amount of property. It is largely a corporate vehicle for a cooperative network arrangement. Consequently, the licensee stock interests in Mutual are, at present, from an investment standpoint, largely symbolic. For the present at least, and particularly in the light of the dominant position of CBS and NBC, there is no reason to require these licensees to divest themselves of their stock interests in Mutual.

Accordingly, at this time we find no reason to establish a definite policy concerning licensee ownership of networks. If, in the future, the question becomes significant, we will give it further consideration.

F. NBC'S RED AND BLUE NETWORKS

Largely because it has 2 networks, many more stations are affiliated with NBC than with any other network organization. When NBC presented evidence at the committee hearings it had 161 outlet stations; the number had increased to 214 by the end of 1940. NBC is the licensee of 2 stations in each of 4 cities. At the time of the committee hearings, NBC had 2 outlets in over 30 cities. The number of cities in which there are 2 NBC stations is now about 40. One is generally a Red network station and the other a Blue network station, although the demarcation is frequently not clear.

The Red network carries more commercial programs, and the Blue more sustaining programs; the disparity in this respect is marked. In 1938, NBC sent 74.5 percent of its commercial programs over the basic Red and only 25.5 percent over the basic Blue. Although NBC does not separate income and expense as between them, the Red is obviously the money-maker of the two. In 1938 NBC paid its 17 independently owned outlets on the basic Red network $2,803,839 for network commercial programs; to the 18 on the basic Blue network it paid only $794,186.

Despite this great disparity, NBC's network affiliation contracts do not specify whether a given station is to be affiliated with the Red or the Blue network. NBC retains the right to shift a station from one network to the other, regardless of the station's wishes. This power gives NBC undue control over its affiliated stations.

NBC's witnesses testified that the Red and Blue networks compete vigorously for listening audiences and for the advertising dollar. But the competition between Red and Blue is largely of an intramural character. Even taking into account the changes which NBC has made in its organization since the time of the committee hearings, there is no complete allocation of stations or programs between the Red and Blue networks, nor any clear demarcation between the properties, personnel, income or expenses of the two networks. No claim is made that the two networks compete for affiliates. So far as competition for advertising and listeners is concerned, it is conducted in a friendly manner under the direction of the NBC board of directors and for the financial benefit of NBC.

Although the sales and program personnel allocated to the Red or the Blue network may now engage in friendly rivalry, it is hardly to be supposed that this rivalry will ever reach the point where NBC employees are acting against the best interests of NBC. Under such conditions, there can be no competition as that term is properly used.

NBC's chairman testified that if NBC owned all four networks, there would still be a competitive situation so far as the listener is concerned. This is a time-worn argument of corporations facing charges of monopoly. It proves too much, and reduces the whole theory of our competitive economy to an absurdity. What NBC's chairman was pleased to call "competition" is not the thing that keeps the opportunity to engage in network broadcasting open to anyone willing to risk his capital and energy, nor does it assure the public the benefits of the healthy and vigorous interplay of economic forces among those engaged in the business. If a single company owned and operated all the drug stores in a city, there would be no less a monop-

oly because the company refrained from closing all the stores but one, or even organized sales campaigns among the various stores. As long as all the efforts of the employees redound to the benefit of a single employer, there is merely the shadow of competition without its substance.

The operation of the Red and Blue networks by NBC gives it a decided competitive advantage over the other two national networks. In the first place, under the NBC discount policy, a discount up to 25 percent is granted to advertisers based upon the amount of business they do with NBC. This gives the Blue network, for example, a marked advantage over the other networks in getting the business of a national advertiser who is already sponsoring a program over the facilities of the Red network. In addition, NBC grants certain special discounts to advertisers to encourage the sale of time over certain Blue network stations.

Again, NBC is able to arrange certain of its most attractive facilities into one combination. In view of the differences between the power and frequency of individual stations, NBC's ability to substitute a more desirable station if an advertiser is dissatisfied with the one customarily provided puts its competitors at a decided disadvantage.

Likewise, the operation of two networks gives NBC a great advantage in terms of programming. By this arrangement, NBC has roughly twice as many hours at its disposal each day as does either CBS or Mutual. For any single period, CBS and Mutual must make a choice between two commercial programs, or between a commercial and sustaining program, or perhaps between an entertainment and a public service feature. NBC, with two networks at its disposal, can simultaneously send an educational program over the Blue and a variety entertainment commercial program over the Red. Furthermore, NBC is in a position to assure advertisers buying time on one of its networks that they will not meet serious competition for listening audiences from the programs scheduled simultaneously on its other network.

NBC takes the position that station demand for affiliation with it is the reason for its two networks. But it is not without significance that NBC's second network—the Blue—was formed before this demand had had any real opportunity to manifest itself. The Blue network was organized in 1926, immediately after NBC took over station WEAF (the key station of the Red network) and the Telephone Co. network. RCA already owned station WJZ, and this station was the basis of the present Blue network.

But without regard to how or why NBC created two networks, it seems clear that the Blue has had the effect of acting as a buffer to protect the profitable Red against competition. Available radio facilities are limited. By tying up two of the best facilities in lucrative markets—through the ownership of stations, or through long-term contracts containing exclusivity and optional-time provisions—NBC has utilized the Blue to forestall competition with the Red. We have already noted that Mutual is excluded from, or only lamely admitted to, many important markets. In such important cities as Milwaukee, Toledo, Salt Lake City, and Jacksonville, both the Red and the Blue have outlets, but Mutual can get no affiliation whatever. In Cleveland, Baltimore, New Orleans, Louisville, and Atlanta, both

the Red and the Blue have outlets, but Mutual can get only an unsatisfactory facility in terms of power or coverage. In Houston, Birmingham, Providence, Des Moines, Memphis, Oklahoma City, and Tulsa, the Red and the Blue are provided for but Mutual must share an affiliate. The effect upon a new network of NBC's preemption of the best facilities in many markets would, of course, be even more restrictive. The existence of this situation can hardly fail to discourage anyone who might otherwise seek to enter the network broadcasting field.

We are impelled to conclude that it is not in the public interest for a station licensee to enter into a contract with a network organization which maintains more than one network. With two out of the four major networks managed by one organization, a station which affiliates with that organization thereby contributes to the continuance of the present noncompetitive situation in the network-station market. The reestablishment of fair competition in this market is contingent upon ending the abuses inherent in dual network operation; our regulation is a necessary and proper means of reestablishing that fair competition.

Our determination that it is not in the public interest for a station to enter into a regular affiliation contract with a network organization maintaining more than one network does not, however, rest merely upon competitive considerations. We are seriously concerned also with the maintenance of a free radio system from the point of view of concentration of power over licensees and their listeners.

In most large countries today, radio broadcasting is a governmental monopoly.[31] The United States has rejected government ownership of broadcasting stations, believing that the power inherent in control over broadcasting is too great and too dangerous to the maintenance of free institutions to permit its exercise by one body, even though elected by or responsible to the whole people. But in avoiding the concentration of power over radio broadcasting in the hands of government, we must not fall into an even more dangerous pitfall: the concentration of that power in the hands of self-perpetuating management groups.

Under any system of broadcasting, someone must decide what a station will put on the air and what it will not. Someone must select some programs and reject others. Congress has chosen to leave that power in the hands of individual station licensees, subject to the public interest provisions of the Communications Act and the powers delegated to this Commission. Decentralization of this power is the best protection against its abuse. We cannot permit the protection which decentralization affords to be destroyed by the gravitation of control over two major networks into one set of hands. While the concentration of power resulting from operation of a network is unavoidable, the further concentration of power resulting from operation of two networks by one organization can and should be avoided.

The radio spectrum is essentially public domain. In delegating to this Commission the power to license, Congress was moved by a fear that otherwise control over that public domain would gravitate into

[31] Huth, *La Radiodiffusion Puissance Mondiale, passim.*

too few hands.[32] Stations entering into regular affiliation contracts with a network organization operating more than one network defeat the manifest intent of Congress. We conclude that such concentration of power over licensees and their audiences violates the public interest:

G. LIMITATION OF COMPETITION BETWEEN NETWORK AND OUTLET

Improvement in the quality of electrical transcriptions in recent years has made it possible for individual stations, including network affiliates, to compete with networks for some of the business of national advertisers. In 1934, national spot business involving the use of electrical transcriptions amounted to $13,500,000; in 1938, to $34,680,000. Transcriptions have made it possible for affiliates to compete for national business by offering programs comparable in popularity to those of the networks. Continuing and unrestricted competition between network and outlet for this business will provide the public with steadily improving program service.

NBC has attempted to protect itself against competition with its affiliates for the business of national advertisers by inserting the following provision in its affiliation contracts:[33]

> If you accept from national advertisers net payments less than those which NBC receives for the sale of your station to network advertisers for corresponding periods of time, then NBC may, at its option, reduce the network station rate for your station in like proportion, in which event the compensation due you from NBC will be likewise reduced but the right of termination provided for in the preceding paragraph shall not thereby accrue to you.

This provision means that an affiliated station cannot accept the business of a national advertiser at a rate lower than that which NBC has established as the affiliate's rate for network programs without subjecting itself to the risk that this lower rate will be applied to all of the affiliate's network business. A contract of this kind, providing a severe penalty for price-cutting, is equivalent to, and has the same effect as, a price-fixing agreement.

NBC frankly concedes that the purpose of the provision is to prevent its affiliated stations from entering into competition for national advertising business:

> This means simply that a national advertiser should pay the same price for the station whether he buys it through one source or another source. *It means that we do not believe that our stations should go into competition with ourselves.* It means that if a national advertiser is able to plan a campaign whereby he could place a partial network order and a partial transcription order on these stations, in order to save money, all network business suffers, and this precaution was put in there to prevent that. However, we have not, up to date, reduced any of the station rates to meet the rates fixed by the stations themselves for national spot advertising, but that is no promise that we will not do it. * * *
>
> Last summer, one of the leading advertising agencies in the country that places millions of dollars' worth of business in radio advertising, in discussing a particular account that was on the NBC network, pointed out the wide discrepancy that exists at some stations between the charges which the National Broadcasting Co. makes and the charges which the station makes. The discrepancy was sufficiently great that with a list of 15 or 16 stations which were shown to me, *if the national advertiser had been willing to sacrifice the advantages of simultaneous live talent broadcasts and substitute therefor electrical transcriptions*

---

[32] *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137.

[33] There is no similar provision in either the CBS or Mutual affiliation contracts. For a description of the way in which their contracts operate, see *supra*, pp. 34–44.

on those 15 or 16 stations, the client would have been able to, save $44,000 in 1 year, and that is not particularly healthy, in my estimation (Hedges, Tr. 1825-26). [Italics supplied.]

No other explanation of NBC's position was made and no reason appears why the affiliate's national spot rate should be artificially pegged at the network rate. In setting the network station rates of its affiliates, NBC considers primarily the potential circulation or listening audience of each station. According to the testimony of its vice president in charge of station relations, absolutely no account was taken of the local competitive situation. Stations whose potential audiences were the same were given the same network rate whether they were the sole stations in their communities or had to split their audiences with several competing stations. Likewise, no account was taken of the purchasing power of the communities served by the affiliate, or of other factors that might affect the value of the station to advertisers.

Several factors tend to make national spot rates lower, at least where electrical transcriptions are used, than comparable network rates. In the first place, electrical transcription programs avoid the heavy telephone line charges incident to network broadcasts. Transcription programs are distributed to stations by shipping the actual discs on which the programs have been recorded.

Furthermore, opinions differ concerning the relative advertising effectiveness of transcriptions and live talent programs. There is no reason why such differences of opinion should not be permitted to play a part in negotiating station rates, or why they should not be reflected in rate differentials between the two types of business.

Finally, only the less desirable hours of the broadcast day are outside the NBC optional-time provisions and thus available for national spot business without being subject to call by NBC. If time within the option period is sold, such programs are subject to be shifted by NBC on 28 days' notice. This inability to enter into firm commitments makes national spot programs less desirable to advertisers than NBC network programs. While the elimination of option time will remove this factor, the others will, of course, remain.

It is no wonder, therefore, that many of NBC's affiliates, despite the danger of sanctions, have adopted a national spot rate less than the network rate. One exhibit shows that 53 NBC affiliates have a national spot rate lower than the network rate, whereas only 36 have a higher rate.

Despite the large number of affiliates whose national spot rates were lower than the network rate, NBC's vice president in charge of station relations testified that NBC had never reduced a station's network rate for this reason. But, he added, "that is no promise that we will not do it." The threat that the network rate will be reduced is ever present. The failure to invoke the power to reduce the network rate does not show that the provision has been ineffective. The mere retention of the power seems to have been sufficient to prevent the kind of free competition regarded by NBC as "not particularly healthy." Apparently the suggestion made in the summer of 1938 that one large advertiser could save some $44,000 annually by using transcriptions over 15 or 16 NBC affiliates did not develop beyond the stage of a mere suggestion. There is no evidence in the record that any adver-

tiser and group of affiliates had the temerity to carry through such a money-saving project to determine whether NBC would invoke the rate-control provision of its affiliation contract when some real competition was offered.

We conclude that it is against the public interest for a station licensee to enter into a contract with a network which has the effect of decreasing its ability to compete for national business. We believe that the public interest will best be served and listeners supplied with the best programs if stations bargain freely with national advertisers.

H. INTERRELATIONS AMONG NETWORK PRACTICES

In considering above the network practices which necessitate the regulations we are adopting (*infra*, p. 91), we have taken each practice singly, and have shown that even in isolation each warrants the regulation addressed to it. But the various practices we have considered do not operate in isolation; they form a compact bundle or pattern, and the effect of their joint impact upon licensees necessitates the regulations even more urgently than the effect of each taken singly. A few examples will suffice to illustrate the way in which restraints in the network field reinforce one another and cumulatively impair the freedom of licensees to render the best possible public service.

Consider in the first place the conjoint effect of the restraints on the establishment of a new network. With more than 97 percent of the Nation's nighttime wattage affiliated with existing networks, a new network can hardly be built up from among unaffiliated stations. Nor are many affiliates free to change their affiliation to such a proposed new network, for most of them are under 5-year contracts.

If stations already affiliated should wish to carry some programs of such a proposed new network, they are restrained by their exclusivity clauses. And even without these exclusivity clauses, time sold to a new national network would be subject for the most part to options on 28 days' notice—thus preventing the development of an effective program series. Thus each doorway into the network field is both locked and bolted.

The exclusion of new networks from the industry is especially onerous because of the failure of existing networks to render service on a truly national basis. They have left a number of communities, especially in the West and Middle West, wholly without network service, and many more with inadequate service or service from only one network. Under such circumstances, it is especially important to keep the door open for new networks which may be willing to serve areas now unprovided for.

Consider next the position of a licensee tied to a network by the usual standard affiliation contract when he seeks to procure programs sponsored by national advertisers. The exclusivity clause of his affiliation contract prevents him from accepting such a program from any other network; hence he must either get it through the network with which he is affiliated or else try to get it on a spot basis.

But in soliciting a national advertiser for spot business, the licensee of a network-affiliated station runs up against the fact that all or the best part of his station's time is under option to the network, subject to 28 days' notice. Hence he cannot enter into a firm contract with the national advertiser for a period long enough to insure the

advertiser of building a continuing audience. Some NBC affiliates are also hampered by the clause which enables NBC to penalize them if they sell time to national advertisers directly for less than NBC charges for their time.

Affiliates are heavily dependent upon their national network for access to national advertisers; but the network may have interests quite disparate from its outlets. It may, for example, own two networks and favor one as against the other. Or it may own stations itself, and hence be in a position where it will profit more by favoring the scheduling of programs over the stations it owns rather than over the full network. In short, the joint effect of the various practices mentioned is to place the licensee to a considerable degree at the mercy of the network with which he is affiliated, but to leave the network free to pursue interests which may be very different from those of the licensees affiliated with it. And, although the network may abandon him on 1 year's notice, a licensee, dissatisfied with the arrangement, cannot renounce it; he is bound for a period of 5 years.

Consider also the position of a station licensee who seeks to maintain a well-balanced schedule of local, regional, and national programs. He can broadcast important local events during periods when network commercial programs are being offered only if he can sustain the burden of proof that the network programs are not in the public interest. His local programs during all or many hours of the broadcast day can only be scheduled subject to the network's option on those hours. Only under exceptional circumstances can he schedule a local program for a time when the network is offering him a network commercial program. If a local sponsor demands assurances that his broadcast time will not be preempted by the network under its option, the station licensee has the choice between not scheduling the local sponsor's program at all or scheduling it for a period which the network gives to a regular sustaining program, thus depriving listeners of that sustaining program. Nor can the listeners procure that sustaining program through another local station, for the network affiliate has territorial exclusivity either by contract or in practice.

Consider in the third place the position of listeners in cities like Milwaukee, Toledo, Salt Lake City, and Jacksonville, in which Mutual can obtain no outlet whatsoever. Such listeners are, thanks to the usual exclusivity clause, deprived of Mutual program service even though the station licensees may wish to offer it along with NBC or CBS service. Where an NBC or CBS station rejects a network program, listeners are deprived, thanks to the territorial exclusivity clause, of an opportunity to hear that program even though another station wishes to broadcast it. The time-option clause and the clause restricting an NBC affiliate's right to compete with NBC deprive listeners of an opportunity to hear locally sponsored programs which might otherwise be available. The clause requiring affiliated stations to broadcast all network commercial programs offered during option hours, subject only to the usual "public interest" proviso, deprives listeners of the opportunity to hear other programs which the station might prefer to schedule during those periods.

At every turn, in short, restrictive clauses taken cumulatively operate with even greater force than their effect considered in isolation

would suggest. Our decision to promulgate the regulations considered in this chapter is buttressed by this consideration of cumulative effect. This bundle of restraints upon the station licensees is not compatible with the public interest.

I. STATUS OF NETWORK-STATION RELATIONSHIPS UNDER THESE REGULATIONS

This report is based upon the premise that the network system plays a vital role in radio broadcasting and has brought great benefits to it. We have carefully drawn our regulations so as not to interfere with any of the three major functions which a network performs—the sale of time to advertisers; the production of programs, both commercial and sustaining; and the distribution of programs to stations.

Under the regulations herein set forth, a network will still be able to enter into regular affiliation contracts. A station will still be able to hold itself out as the regular affiliate of a given network.

A network can still sell the use of its facilities to advertisers in accordance with published rate schedules in much the same manner as it now does. The fact that networks must ascertain whether each station has a specific period uncommitted before entering into a firm contract for that period need not unduly hinder their selling activities. The network can and undoubtedly will require that all stations intending to broadcast its programs keep it currently informed of all station commitments.

The networks' right to produce programs is wholly unaffected. Their right to distribute programs is vastly enlarged, for hereafter any network will be free to distribute programs to any station.

Similarly, networks will be free to offer program service to stations regularly affiliated with them throughout any or all of the hours of the broadcast day. We do not see that the public interest requires, and nothing in our regulations necessitates or suggests, that stations shift hourly from network to network. We are concerned rather with insuring that, at reasonable intervals, a station will be free to change its regular network affiliation, and, as occasion requires, to broadcast the programs of networks with which it is not regularly affiliated, and to exercise independent judgment in rejecting or refusing network programs. To the extent that the networks' present status rests upon excellence of service rather than coercive power, it will remain substantially unaffected.

J. APPLICATION OF REGULATIONS TO REGIONAL NETWORKS

Examination of the record herein indicates that the practices of national networks subjected to criticism by us are followed by certain regional networks.[34]

We recognize that the regional networks are in a state of more rapid flux than the national networks; and that new regional networks have arisen since the committee hearings were held. Accordingly, we will carefully consider, in particular instances, any showing that the application of the regulations herein adopted to a station affiliated with a regional network will reduce rather than increase its ability to operate in the public interest.

[34] See *supra*, p. 29; *infra*, Appendix D.

Regional networks fall into two classes—purely regional networks, and nationally affiliated regional networks which act as conduits for national network programs.[35] The record indicates that the conditions which will be affected by the regulations contained in this report are more common among nationally affiliated regional networks than among regional networks not so affiliated.

Some regional network affiliation contracts contain exclusivity clauses preventing stations from carrying any network programs, regional or national, not sent through the regional network. Some contain clauses which prevent regional networks from sending programs to other stations in areas served by their affiliates; this clause is effective even though the affiliate rejects the network program. Some regional networks have options on substantially all the time of their affiliates; and some stations affiliated with regional networks have signed away their right to reject network commercial programs offered during optioned hours, save only for the usual proviso concerning programs the broadcasting of which would violate the "public interest" provision of the Communications Act. At least one regional network's standard affiliation contract provides that the network may proportionately reduce the compensation of any station which sells time to advertisers at less than the rate which the network charges for that station; thus, the stations are prevented from competing freely with the network for advertisers. Another regional network's contracts are binding upon its affiliates for 5 years, though on the network for only 1.

Restrictive contracts and the other practices with which these regulations are concerned restrain competition and operate against the public interest whether the network concerned is national, nationally affiliated regional, or purely regional. True, the national network restraints loom larger; but this should not and does not blind us to the need for terminating or forestalling similar restraints whose only distinguishing characteristic is that they are of local or regional rather than national scope. With respect to a given station, a given community, or a given region, a restrictive contract between a station and a regional network, or ownership of many stations by a regional network, may operate to foster a local monopoly and to impair station operation in the public interest just as effectively and as intensively as similar practices on a national scale.

With respect to nationally affiliated regional networks, the need for applying our regulations is especially clear. When a licensee enters into a long-term exclusive contract containing optional time and other restrictive clauses with a nationally affiliated regional network, the effect, so far as restraint of competition is concerned, is substantially the same as if the station had entered into such a contract directly with a national network. Indeed, in some situations the effect may be even more restrictive. Consider, for example, the plight of a station in Washington or Oregon which wishes to carry Mutual network programs. Mutual has an exclusive contract with Don Lee

[35] As used in this report "nationally affiliated networks" include not only regional networks directly affiliated with national networks but also regional networks which, like Pacific Broadcasting Co., carry national network programs fed to them by other nationally affiliated regional networks. In both cases the regional network serves as intermediary for the delivery of national network programs to stations. Certain of the outlets of some of the regional networks are also affiliated, on an individual basis, with NBC, CBS, or Mutual. See table on p. 29; see also Appendix D.

providing that it will send programs to Pacific coast stations only through Don Lee. The latter, in turn, has an exclusive contract with Pacific Broadcasting Co. providing that it will send programs to stations in Washington and Oregon only through Pacific. The Pacific standard affiliation contract binds a station for 5 years, prevents a station from carrying any network programs not delivered to it by Pacific, places all of the station's time under option to Pacific, and deprives the station of the right to reject network commercial programs except only those which would interfere with a locally originated program of "major public interest or public necessity". Thus, in order to get Mutual programs, a station in Washington or Oregon must subject itself to these restrictive conditions for a 5-year term, and must bind itself to accept both Pacific and Don Lee as well as Mutual programs. And even then its access to Mutual programs is conditional. If Pacific severs its affiliation with Don Lee, or Don Lee leaves Mutual, the station is shut off from Mutual for the life of its contract.

Exempting the relationship between regional networks and their outlets from the regulations here presented would open the way for permitting this type of arrangement to become the usual pattern of network affiliation. National networks might then surround themselves with a group of associated regional networks, and if stations were permitted to enter into restrictive affiliation contracts with these regional networks, the present restraints would be perpetuated. Our application of the regulations to the relationship between the stations and regional networks as well as to national networks will make impossible such developments.

Many regional networks now operate successfully within the scope of these regulations. Some of these regional networks are in fact cooperative station enterprises, bound together by mutual interest rather than by formal contract. Others are profit enterprises binding stations to them by contract; such contracts vary all the way from those wholly permissible under the regulations to those transgressing substantially every regulation. In general, it may be said that the more powerful a network becomes, the more restrictions it is able to place upon its outlet stations. We believe that this process of increasing restrictions should be reversed, and that stations affiliated with regional networks should retain their freedom of operation in the public interest as fully as stations affiliated with national networks. Accordingly, we find that the public interest requires the application of the regulations to stations affiliated with regional as well as national networks. In the application of these regulations to regional networks, and particularly the regulation with respect to ownership of stations, the Commission will take into consideration any factors of a local character which tend to remove them from the purposes of the regulations we are adopting.

VIII. JURISDICTION

We are satisfied that the Commission has jurisdiction to issue the regulations contained in the attached order, both as an exercise of its licensing function in the public interest and under the grant of authority contained in section 303 (i) "to make special regulations applicable to radio stations engaged in chain broadcasting." Either basis alone amply supports our jurisdiction; together they leave no doubt that the power exercised in these regulations is within the clear intent of Congress. But since much of the oral argument was devoted to the question of the Commission's jurisdiction, and since supplementary briefs discussing this question were filed by several interested parties pursuant to the direction of the Commission, we include a short statement of the legal basis for our conclusions.

A. JURISDICTION UNDER THE COMMISSION'S LICENSING POWER

In considering the scope of the Commission's licensing power as a basis of jurisdiction in this proceeding, two questions are presented. First, has the Commission authority to deny a license or a renewal on the ground that the applicant's contractual relations with a network either impair his ability to operate in the public interest or limit the maximum utilization of radio facilities by artificially restraining competition and restricting the growth and development of new networks? Secondly, if the first question is answered in the affirmative, can the Commission formulate into general rules and regulations the principles which it intends to apply in passing on individual applications?

1. The power to deny applications

Congress has delegated to the Commission the task of determining whether the grant of an application for a license or renewal will serve "public interest, convenience, or necessity." The standard of public interest is given significance "by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services," and by the general objectives of the statute.[1] As thus construed by the Supreme Court, the term "public interest" clearly refers to the interest of the listening public in the fullest and most effective utilization of radio facilities.

The general objectives of the Communications Act, as stated in section 1, are to "make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." This provision is supplemented by section 303 (g) which provides that the Commission

[1] *Federal Radio Commission* v. *Nelson Bros. Bond and Mortgage Co.*, 289 U. S. 266, 285; cf. *United States* v. *Louden*, 308 U. S. 225.

shall "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest.

We have already seen that many of the provisions of the affiliation contract do prevent the licensee from fully utilizing his facility. Time options adversely affect the ability of licensees to serve the local needs of their communities for program and advertising service. Artificial limitations on the price which licensees may charge national advertisers hamper licensees' efforts to render the best possible program service. Restrictions imposed on the affiliates' freedom to reject network commercial programs prevent them from assuming their full statutory responsibility (which under the Act they cannot delegate) of determining what programs should go out over the facilities licensed to them. Exclusivity provisions which prevent affiliates from carrying the programs of other networks and which prevent any other station within the "territory" of the affiliate from obtaining programs from the latter's network, deprive many listeners of the opportunity to hear certain worthwhile programs. Long-term affiliation contracts prevent the licensees from bargaining at reasonable intervals for the best network programs. Affiliation with a network organization operating two networks contributes to a concentration of control over stations and the programs they broadcast incompatible with the public interest. Network ownership of a large number of stations creates a potential conflict between the interest of the network as a station owner and its interest as a network organization.

It is no answer to say that the network stations render better service to the public than do unaffiliated stations. This is by no means established by the evidence, particularly if consideration is given to such factors as the needs of the local communities in which the stations are located. But, even if the superiority of network station service were assumed, it would not follow that the regulations we are adopting are either unnecessary or invalid. The Commission's licensing function is not limited to determining simply whether the service of one station is satisfactory as compared with that of other stations. The Commission has the duty to grant licenses and renewals only to those applicants who propose a maximum utilization in the public interest of the facilities they request.

It would hardly be contended, for example, that the Commission lacks authority to deny a license or renewal to an applicant whose use of his facility is limited by an inefficient antenna design which fails to make the optimum use of an advantageous transmitter site. Surely the Commission would not be required to issue a license just because the applicant could show that he was laying down as strong a signal as that of other stations with the same power. If the peculiar advantages of his transmitter site would enable him to achieve more extensive coverage with a more efficient antenna system, the public interest demands that he install such an antenna.

It is fundamental that any determination of public interest must be based upon a consideration of the service a station renders against the background of the service it could render. We have found that however meritorious the service of network affiliates as compared to that of nonnetwork stations, that service could be markedly improved if the affiliates were free from the restrictions that now bind them. This is no different from the determination that a licensee does not operate in the public interest if he merely renders as good a service as that of other stations with equal power where his advantageous transmitter site would enable him to render a superior service with an efficient antenna system.

So far we have considered only the direct impact of these restrictions on the licensee's ability to serve the public interest. But this is only a part of the Commission's responsibility. The public interest in the fullest and most effective utilization of radio facilities is likewise adversely affected by the curtailment of competition which these restrictions entail. In the last chapter we noted that the network-outlet contracts have resulted in closing the door of opportunity to new networks and have stifled competition among stations for network affiliation, among networks for station outlets and between networks and stations for advertisers and listeners. We noted too that network ownership of numerous radio stations has likewise meant the curtailment of opportunities for new networks and has given the existing networks a substantial competitive advantage over any newcomers. We noted, further, that, with two of the four major networks managed by one organization, affiliation with that organization contributed to the continuance of the present noncompetitive situation in the network-station market. The net effect has been that broadcasting service has been maintained at a level below that possible under a system of free competition. Having so found, we would be remiss in our statutory duty of encouraging "the larger and more effective use of radio in the public interest" if we were to grant licenses to persons who persist in these practices.

The Commission's duty to act also flows from the fact that Congress expressly wrote into the act the requirement of free competition in the radio field. It provided in section 3 (h) that persons engaged in radio broadcasting should not be deemed common carriers. By section 313 it specifically made the antitrust laws applicable to persons engaged in radio communication and authorized the courts to revoke the license of any person found guilty of violating the antitrust laws. In section 311 it directed the Commission to refuse a license to any person whose license has been revoked by a court under section 313 and authorized the Commission to refuse a license to any person found guilty by a Federal court of having violated the antitrust laws with respect to radio communication. By section 314 it forbade persons engaged in radio communications from engaging in communication by wire, or vice versa, if the effect thereof is substantially to lessen competition or to restrain commerce. These elaborate provisions against restraints on competition leave no doubt that Congress intended to safeguard free competition in the radio broadcasting industry. In the very Act in which it made clear its mandate as to free competition, Congress set up this Commission to license radio stations in the public interest. We cannot believe

that Congress intended to leave us powerless to deal with restraints which might fetter the free competitive field it sought to maintain or to require us to promote unlawful conduct by our own affirmative action.

The Supreme Court decisions interpreting the Communications Act and its predecessor support the view that the preservation of free competition is one of the objectives recognized by Congress. In *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474–5, the Court said:

> Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 137, the Court said:

> Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses.

While many of the network practices raise serious questions under the antitrust laws,[2] our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals.[3]

---

[2] In this category would be included at least territorial exclusivity and exclusivity of affiliation (*Montague & Co.* v. *Lowry*, 193 U. S. 38; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423; *United States* v. *Terminal Railroad Assoc.*, 224 U. S. 383; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346); and agreements between outlets and networks penalizing stations for selling time to national advertisers at less than the network rate. (*Dr. Miles Medical Co.* v. *Park & Sons Co.*, 220 U. S. 373; *United States* v. *Trenton Potteries Co.*, 273 U. S. 392; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150.)

[3] The networks seem to contend that our power to deal with restrictions on competition is limited to the authority conferred in section 311. That section provides:

"The Commission is hereby directed to refuse a station license and/or the permit hereafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313, and is hereby authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing, or attempting unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition."

It is not entirely clear just what point the networks seek to make. If the argument they advance is that we cannot deny a license to an applicant on the ground that his practices violate the antitrust laws unless a Federal court has first found the applicant guilty, then they misinterpret our decision. We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest.

If the contention is that we cannot consider restrictions on competition unless they do constitute violations of the antitrust laws and have been so declared by a Federal court, it completely disregards the legislative history of the Communications Act and its predecessor as well as Supreme Court decisions. The encouragement "of the larger and more effective use of radio in the public interest" which we are required to foster and the power to license stations to serve in the public interest are independent of the grant of authority contained in section 311. That section merely emphasizes the importance which Congress attached to the preservation of competition in the radio field. It directs or

The networks contend, however, that the Commission has no jurisdiction over the contractual relations between licensees and networks because they are "business" practices and policies beyond the pale of Commission action. The language of the Supreme Court in the *Sanders* case—"The act does not essay to regulate the business of the licensee"—is cited in support of this argument. The simple answer to this contention is that it misreads the *Sanders* case. The Court there held that the Commission has no authority over the business of broadcast licensees *qua* business, as it does in the case of common carriers. This is very different from a holding that, even in the presence of adequate ground of jurisdiction, an activity is exempt from regulations merely because it is a business practice. As stated by the Court:

> In contradistinction to communication by telephone and telegraph which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

There is nothing in the *Sanders* opinion which gives any support to the contention that we cannot, in exercising our licensing function, consider factors which might affect the ability of the station to serve the public interest just because those factors happen to be what might be called the business of the licensee. In denying licenses to applicants on the ground that their contractual arrangements with the networks prevent them from utilizing the available radio facilities in the fullest and most effective manner, the Commission does not regulate the business practices of licensees. There is here no attempt to fix rates, to prescribe a uniform system of accounts, to regulate advertising, to supervise the programs or the business policies of the licensee, or to impose any of the obligations which are applicable to common carriers. The denial by the Commission of a license or renewal merely involves a determination that the contractual relations with the networks affect adversely the ability of licensees to operate their stations in the public interest. This is no different in principle from a denial of a license on the ground that a contract which a licensee has with a third person for the exchange of certain of his assets—obviously a business matter—renders him insolvent and incapable of operating in the public interest. Licensees cannot escape the consequences of their acts or shirk their duty of properly serving the public by the simple device of describing their operating activities as business practices.

---

authorizes the Commission, as the case may be, to refuse a license on the basis of a finding by a court that the applicant violated the antitrust laws, without requiring the Commission to hold its own hearing to verify the facts found by the court or to determine whether the practices which constitute the violation would in fact prevent the fullest use of radio facilities. It certainly does not detract from our power to refuse a license or renewal when our own hearing or investigation reveals that practices of the applicant (whether violations of the antitrust laws or not) prevent the maximum utilization of radio facilities.

2. The power to issue rules and regulations

The objection has been raised that even if we have the power to deny a license or renewal on the ground that a particular affiliation contract prevents an individual station from operating in the public interest, we are nevertheless without power to issue rules and regulations of general applicability. But this contention reads out of the Communication Act the power given to the Commission by Congress in section 303 (f) to "make such regulations * * * as it may deem necessary * * * to carry out the provisions of this act." See also section 303 (r). It would deny the Commission, too, the power contained in section 4 (j) "to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." We believe that the announcement of the principles we intend to apply in exercising our licensing power will expedite business and further the ends of justice.

Announcements of policy may take the form of regulations or of general public statements. In either case, the applicant's right to a hearing on the question whether he does in fact propose to operate in the public interest is fully preserved. The regulations we are adopting are nothing more than the expression of the general policy we will follow in exercising our licensing power. The formulation of a regulation in general terms is an important aid to consistency and predictability and does not prejudice any rights of the applicant. Good administrative practice would seem to demand that such a statement of policy or rules and regulations be promulgated wherever sufficient information is available upon which they may be based.[4]

B. JURISDICTION UNDER THE COMMISSION'S POWER TO MAKE SPECIAL REGULATIONS RESPECTING CHAIN BROADCASTING

If any doubts exist as to the propriety of the regulations viewed as an exercise of the Commission's licensing power, they are completely dispelled by section 303 (i). This section gives to the Commission the specific power to "make special regulations applicable to radio stations engaged in chain broadcasting." No language could more clearly cover what we are doing here.

It has been contended, however, that this provision only empowers the Commission to deal with problems of a technical nature involved in chain broadcasting. The complete answer to this contention is that the language employed by Congress is too broad and general to permit of so narrow an interpretation. We cannot assume that Congress did not mean what it said.

Moreover, the legislative history of this provision demonstrates that Congress did intend section 303 (i) to be of general application and specifically that it should include the power to deal with restrictions upon competition in chain broadcasting.

Section 303 (i) is carried over verbatim from section 4 (h) of the Radio Act of 1927.[5] It appeared for the first time, in a somewhat

---

[4] See *Administrative Procedure in Government Agencies*, 77th Cong. 1st sess., S. Doc. 8, p. 27.

[5] The NBC brief in this proceeding quotes from page 21 of the Federal Radio Commission's *First (sic: Second) Annual Report to Congress* (1928) as evidence for the view that the Commission considered its power to regulate chain broadcasting under section 4 (h) of the 1927 act was limited to its obligation to maintain a fair, efficient, and equitable distribution of broadcasting facilities. The brief suggests that when Congress

different form, in the bill as reported by the Senate Committee on Interstate Commerce. It reads as follows:

> When stations are connected by wire for chain broadcasting, [the Commission should] determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting.

The report of the Senate committee states that this provision gives to the Commission "complete authority * * * to control chain broadcasting."[6]

The bill passed the Senate in the above form. The conference committee revised the section and reported it back in the more general and flexible form which finally became law.

The meaning of section 4 (h) was explained by Senator Dill, the Senate sponsor of the bill, in the debate on the conference report. He said:

> In the first place, under this bill chain broadcasting today * * * is absolutely without any regulation. We have no law today to handle the situation, and the various radio organizations, including the Radio Corporation of America and the American Telephone & Telegraph Co., are going ahead and building up the chain stations as they desire without let or hindrance and without any restrictions, because the Secretary of Commerce has no power to interfere with them. Unless this proposed legislation shall be enacted they will continue to do so, and they will be able by chain-broadcasting methods practically to obliterate the independent small stations, as the man who wrote the telegram suggests. *While the commission would have the power under the general terms of the bill, the bill specifically sets out as one of the special powers of the commission the right to make specific regulations for governing chain broadcasting.* As to creating a monopoly of radio in this country, let me say that this bill absolutely protects the public, so far as it can protect them, *by giving the commission full power to refuse a license to anyone who it believes will not serve the public interest, convenience, or necessity.* It specifically provides that any corporation guilty of monopoly shall not only not receive a license but that its license may be revoked; and if after a corporation has received its license for a period of three years it is then discovered and found to be guilty of monopoly, its license will be revoked.
>
> * * * * * * * * * * * * In addition to that, the bill contains a provision that no license may be transferred from one owner to another without the written consent of the commission, and the commission, of course, *having the power to protect against a monopoly*, must give such protection.
>
> I wish to state further that the only way by which monopolies in the radio business can secure control of radio here, even for a limited period of time, will be by the commission becoming servile to them. *Power must be lodged somewhere, and I myself am unwilling to assume in advance that the Commission proposed to be created will be servile to the desires and demands of great corporations of this country.*[7] [Italics supplied.]

---

thereafter reenacted without change section 4 (h) as section 303 (i) of the Communications Act, it presumptively approved this interpretation by the Federal Radio Commission.

In fact, however, the Commission merely pointed out that it had issued a regulation (General Order No. 43, Sept. 8, 1928) limiting the use of cleared channels for chain programs by requiring a separation of 300 miles between stations broadcasting such programs, with certain exceptions; and that later, for reasons of policy, it had suspended the order. Neither in the passage quoted nor elsewhere in the report did the Commission even allude to any limitation in its jurisdiction over chain broadcasting. Moreover, it does not follow from the fact that this regulation was concerned with fair distribution of facilities that the Commission construed this section as applicable only to problems of a technical nature involved in chain broadcasting. Consequently, there is no logical basis for the presumption contended for by NBC. *Cf. Helvering* v. *Hallock*, 309 U. S. 106.

[6] S. Rep. 772, 69th Cong., 1st sess. (1926), p. 3.

[7] 68 Cong. Rec. 2881. See also statements by Representative White, 68 Cong. Rec. 2579–2580, and by Senator Dill, 67 Cong. Rec. 12,352.

This explanation of the scope of section 4 (h) by the Senate sponsor of the bill completely substantiates the Commission's jurisdiction to issue the regulations involved here. It shows that section 4 (h) was written into the statute to remove any possible doubt which might exist under the licensing provision of the Act with respect to the Commission's power to regulate chain broadcasting. As Senator Dill said: "While the Commission would have the power under the general terms of the bill, the bill specifically sets as one of the special powers of the Commission the right to make specific regulations for governing chain broadcasting."

IX. CONCLUSION

We have exercised our jurisdiction upon the premise, generally accepted by the public and the industry, that the network method of program distribution is in the public interest. We subscribe to the view that network broadcasting is an integral and necessary part of radio. The regulations which we are promulgating are designed to preserve without loss the contributions of network broadcasting to the public and to the affiliated stations, while ensuring that licensees will exercise their responsibilities under the law. We believe that these regulations will foster and strengthen network broadcasting by opening up the field to competition. An open door to new networks will stimulate the old and encourage the new.

The prophecy that regulations such as we are adopting will "result in the eventual destruction of national program service" and "destroy the American system of network broadcasting" is, we believe, the exaggeration of advocacy. The practices which we find contrary to public interest were instituted to restrict competition within the broadcasting field, not to protect commercial broadcasting from competition by other types of advertising. Everyone familiar with broadcasting as an advertising medium knows that radio reaches a different audience from other types of advertising, and that it reaches them in a different way. We doubt that the networks have so little faith in the stability of their own enterprise as is suggested by their insistence that the whole structure of commercial broadcasting will collapse if their relations with outlets are modified along the lines indicated. It is incredible that the industry's footing is so insecure. The prediction that advertisers will desert radio in favor of newspapers, magazines, or billboards is singularly unconvincing.

We are under no illusion that the regulations we are adopting will solve all questions of public interest with respect to the network system of program distribution. For example, we have not dealt with the activities of the principal networks in the fields of electrical transcription and talent supply, although we recognize, as did the committee, that their activities in these fields "raise problems which vitally concern the welfare of the industry and the listening public." The problems in the network field are interdependent, and the steps now taken may perhaps operate as a partial solution of problems not directly dealt with at this time. Such problems may be examined again at some future time after the regulations here adopted have been given a fair trial.

We have been at pains to limit our regulations to the proven requirements of the situation, and especially to ensuring the maintenance of a competitive market. Radio broadcasting is a competitive industry. The Congress has so declared it in the Communications Act of 1934, and has required the fullest measure of competition possible within physical limitations. If the industry cannot go forward on a

competitive basis, if the substantial restraints upon competition which we seek to eliminate are indispensable to the industry, then we must frankly concede that broadcasting is not properly a competitive industry. If this be the case, we recommend that the Congress should amend the Communications Act to authorize and direct regulations appropriate to a noncompetitive industry with adequate safeguards to protect listeners, advertisers, and consumers. We believe, however, that competition, given a fair test, will best protect the public interest. That is the American system.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C.

COMMISSION ORDER IN DOCKET NO. 5060.

IN THE MATTER OF THE INVESTIGATION OF CHAIN BROADCASTING

May 2, 1941

WHEREAS, the Commission on March 18, 1938, by Order No. 37, authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity;"

WHEREAS, on April 6, 1938, the Commission appointed a Committee of three Commissioners to supervise the investigation, to hold hearings in connection therewith, and "to make reports to the Commission with recommendations for action by the Commission;"

WHEREAS, the Committee held extensive hearings and on June 12, 1940, submitted its report to the Commission;

WHEREAS, briefs were filed and oral arguments had upon the Committee report and upon certain draft regulations issued for the purpose of giving scope and direction to the oral arguments; and

WHEREAS, the Commission, after due consideration, has prepared and adopted the Report on Chain Broadcasting to which this Order is attached;

NOW, THEREFORE, IT IS HEREBY ORDERED, That the following regulations be and they are hereby adopted:

3.101 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization[1] under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization. See Chapter VII, A, 1.

3.102 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. See Chapter VII, A, 2; and J.

3.103 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise, for the affiliation of the station with the network organization for a period longer than one year: *Provided*, That a contract, arrangement, or understanding for a one-

[1] The term "network organization," as used herein, includes national and regional network organizations. See Chapter VII, J.

313425—41——7

year period, may be entered into within sixty days prior to the commencement of such one-year period. See Chapter VII, B.

3.104 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time. See Chapter VII, C.

3.105 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance. See Chapter VII, D.

3.106 No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control [2] with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. See Chapter VII, E.

3.107 No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network. See Chapter VII, F.

3.108 No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs. See Chapter VII, G.

It is Further Ordered, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further*, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties.

Federal Communications Commission,
T. J. Slowie, *Secretary*.

[2] The word "control," as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the station to other networks.

APPENDICES

APPENDIX A

Order Instituting Chain Broadcasting Investigation

Federal Communications Commission,
Washington, D. C., March 18, 1938.

Order No. 37

Whereas under the provisions of section 303 of the Communications Act of 1934, as amended, "the Commission, from time to time, as public convenience, interest, or necessity requires, shall—(1) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and

Whereas the Commission has not at this time sufficient information in fact upon which to base regulations regarding contractual relationships between chain companies and network stations, multiple ownership of radio broadcast stations of various classes, competitive practices of all classes of stations, networks, and chain companies, and other methods by which competition may be restrained or by which restricted use of facilities may result; Now therefore,

It is ordered, That the Federal Communications Commission undertake an immediate investigation to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity; such investigation to include an inquiry into the following specific matters, as well as all other pertinent and related matters, including those covered in the report on social and economic data prepared by the Engineering Department of the Federal Communications Commission and filed with the Commission on January 20, 1938:

1. The contractual rights and obligations of stations engaged in chain broadcasting, arising out of their network agreements.
2. The extent of the control of programs, advertising contracts, and other matters exercised in practice by stations engaged in chain broadcasting.
3. The nature and extent of network program duplication by stations serving the same area.
4. Contract provisions in network agreements providing for exclusive affiliation with a single network and also provisions restricting networks from affiliation with other stations in a given area.
5. The extent to which single chains or networks have exclusive coverage in any service area.
6. Program policies adopted by the various national and other networks and chains, with respect to character of programs, diversification, and accommodation of program characteristics to the requirements of the area to be served.
7. The number and location of stations licensed to or affiliated with each of the various national and other networks. The number of hours and the specified time which such networks control over the station affiliates and the number of hours and the specified time actually used by such networks.
8. The rights and obligations of stations engaged in chain broadcasting so far as advertisers having network contracts are concerned.
9. Nature of service rendered by each station licensed to a chain or network organization, particularly with respect to amount of program origination for network purposes by such stations.
10. Competitive practices of stations engaged in chain broadcasting as compared with such practices in the broadcasting industry generally.
11. Effect of chain broadcasting upon stations not affiliated with or licensed to any chain or network organization.
12. Practices or agreements in restraint of trade or furtherance of monopoly in connection with chain broadcasting.

13. Extent and effects of concentration of control of stations locally, regionally, or nationally in the same or affiliated interests, by means of chain or network contracts or agreements, management contracts or agreements, common ownership or other means or devices, particularly insofar as the same tends toward or results in restraint of trade or monopoly.

It is further ordered, That hearings be held in connection with such investigation at such times and places as the Commission shall designate.

It is further ordered, That a copy of this order be posted in the office of the Secretary and that a copy of the same be mailed to each licensee of a broadcast station and to each chain and network organization.

By the Commission.

T. J. SLOWIE, *Secretary*.

APPENDIX B

MEMORANDUM OF SUBMITTAL ACCOMPANYING REPORT OF COMMITTEE ON CHAIN BROADCASTING, AND CONCLUSION OF THE COMMITTEE'S REPORT

[Excerpt from Committee Report dated June 12, 1940, pp. i-vi and pp. 133-138]

TO THE FEDERAL COMMUNICATIONS COMMISSION:

There is transmitted herewith the report of the Committee on chain broadcasting made pursuant to Order No. 37, authorizing an investigation to determine the necessity for and the nature of special regulations applicable to radio stations engaged in chain or other broadcasting which are required in the public interest, convenience, and necessity.

This report deals with the following subjects: The predominance of network organizations in the radio broadcast field; contractual relation of network organizations to station licensees; radio broadcasting and the supply of talent; transcription services in the radio broadcast industry; and multiple ownership of radio broadcast stations. There is attached to the report, as appendix A, an exhaustive and detailed digest of the evidence received by this Committee during the extensive hearings held by it as well as of other related material in the official files of the Commission. There is also attached, as appendix B, a report compiled by the law department entitled "Report of Persons and Other Entities Holding Stock Interest In, Control Over, or Officer Relationship to More Than One Standard Broadcast Station Reported to the Federal Communications Commission to April 1, 1940."

The Committee is of the opinion that these materials form an adequate basis upon which the Commission may proceed to a consideration of the need for a revision of its licensing policy in the radio broadcast field in order to correct the serious inequities and arbitrary practices which have developed in connection with chain broadcasting.

The record discloses an unhealthy predominance of the network organizations in the radio broadcasting field which is due, in large measure, to the contractual arrangements forced upon stations seeking affiliation with a network. These contractual arrangements have resulted in a grossly inequitable relation between the networks and their outlet stations to the advantage of the networks at the expense of the outlets. These advantages have, in turn, led to further and further expansion of the networks' activities and a sharp curtailment of the scope of activity of the outlet stations.

The provisions of these contracts which forbid the outlet to accept programs from any other network, which prohibit the outlet from accepting programs from national advertisers at rates lower than those charged by the network, and which require the outlet to keep available for the use of the network all, or almost all, of its time, stifle competition and tend to make the outlet the servant of the network rather than an instrument for serving the public interest. The station is thereby rendered incapable of serving as a medium of local self-expression through the broadcast of local programs.

The onerous burden of proof placed upon the outlet when it desires to reject a commercial network program has resulted in the almost universal acceptance of all such network programs and the delegation by the licensee-outlet of its duty to operate in the public interest.

The long life of these contracts and the retention by the networks of the option of renewal, without according a like privilege to the outlet, give the chains a dominant bargaining position sufficient to enable them to dictate policies to the station licensees.

A disproportionate share of the receipts from a network broadcast is retained by the network organization under these contracts. We believe that individual and corporate licensees should be independent and successful if they are to serve fully the public interest.

It is the committee's opinion that many of the evils of chain broadcasting can be removed by the elimination of certain provisions now found in the regular network-outlet contract. The committee believes that there is authority under the statute to deal with the problems raised by these contractual arrangements. Section 303 (*i*) of the Communications Act of 1934 provides that the Commission shall "have authority to make special regulations applicable to radio stations engaged in chain broadcasting." It is our opinion that the authority so granted by the act includes the power to make regulations governing the contracts entered into between a licensee and a network where such contracts affect the duty or ability of licensees to operate in the public interest. The power conferred by section 303 (*i*) is buttressed by the grant of authority contained in sections 307 (*d*) and 309 (*a*) requiring the Commission to refuse licenses or renewals thereof unless the Commission finds that public interest, convenience, or necessity would be served by granting the license or renewal. It is our opinion, based upon the extensive investigation which we have just completed, that public interest, convenience, or necessity are adversely affected by inclusion in the network-outlet contracts of many of the contractual provisions referred to above.

As the report clearly shows, the activities of the principal networks in the fields of electrical transcription and talent supply raise problems which vitally concern the welfare of the industry and the listening public. These and other network practices which have tended to restrict competition in the radio broadcast field can be eliminated or, at least, ameliorated by a redefinition of the licensing policy of the Commission. The problems in the chain broadcasting field are interdependent and closely related with one another and with the network-outlet contract. The elimination of arbitrary and inequitable contractual arrangements will tend to subject the networks to active competition and will render the independent station more secure within the industry, and better able to cope with the networks in all fields of broadcast activity.

The committee believes that the Commission should proceed at once to deal with these problems to the extent that Congress has given it authority in the Communications Act of 1934. In our opinion, the Commission possesses ample power under the Communications Act to redefine its licensing policy and require the elimination of inequitable and arbitrary contractual arrangements which affect the duty of the licensee to serve the public interest.

The committee believes that competition in the radiobroadcast field can be further enhanced by a revaluation of the so-called clear-channel policy, whereby new stations are refused access to clear channels regardless of the service which the new station would be able to render and regardless of how small the interference to the clear-channel station would be. The record evidences that all but two of the high-power clear-channel stations in the United States are on the Columbia and National networks as well as all the high-power regional stations. The exclusive grant of a clear channel to a station which can only serve limited areas prevents people in other sections of the country from receiving service from stations which could otherwise operate on the clear-channel frequency. In our opinion, the Commission should consider the wisdom and practicability of utilizing the clear channels so that people living in all sections of the United States can have the benefit of radio reception at present denied them.

The committee desires also to direct the attention of the Commission to the following problems suggested by the report:

1. The necessity and advisability of requiring networks to be licensed by the Commission.
2. The ownership of stations by networks.
3. The ownership of more than one station by an individual or corporation.
4. The control of talent by networks.
5. The dominant position of National in the transcription field.
6. The difficulties involved in supervising the transfer of control of corporate licensees because of their stock being listed on stock exchanges.

The actual administrative experience which the Commission will obtain under its new licensing policy will enable it to suggest to the Congress the enactment of amendatory legislation to deal with these problems if such is later found to be necessary.

The committee recognizes that various benefits to the public may be achieved through the proper operation of chain broadcasting. It is the opinion of the committee that through the exercise of the powers of the Commission in dealing with the contractual relations between network and outlet, the potential ad-

vantages of the chains in this country can be retained. At the same time, the abuses which have prevented many of its potential advantages from being realized can be corrected. It is the committee's belief that the removal of arbitrary and inequitable provisions from network-outlet contracts will eliminate many of the detrimental practices involved in chain broadcasting without sacrificing any of the benefits.

By the committee.

THAD H. BROWN, *Vice Chairman.*
PAUL A. WALKER, *Commissioner.*
FREDERICK I. THOMPSON, *Commissioner.*

* * * * * * *

VI. CONCLUSION OF COMMITTEE REPORT

The record reveals at every turn the dominant position of the network organizations in the field of radio broadcasting. Of the 660 standard broadcast stations in operation during the year 1938, major networks served 350. These 350 stations included almost all of the high-power stations in the country.

In order to buttress their dominant position in the broadcast industry, the chain organizations have established the practice of owning or otherwise controlling powerful and profitable stations. During the year 1938 Columbia and National alone owned or controlled 23 such stations. The record reveals that the chains have been developed around these network owned and controlled stations and have been operated largely for the networks' benefit. The interests of the independent outlet stations, which are the real foundation of nation-wide broadcasting, have been subordinated to the interests of the network owned and controlled stations.

The problem with respect to the ownership of two or more stations by the same person or group of persons is not unlike that of network ownership of stations. The record evidences a definite trend toward concentration of ownership of radio stations. The 660 commercial stations in 1938 were owned by a total of 460 persons, both natural and corporate. Eighty-seven of these persons owned more than one station each and received in 1938 approximately 52 percent of the total business of all commercial broadcasting stations. To the extent that the ownership and control of radio-broadcast stations falls into fewer and fewer hands, whether they be network organizations or other private interests, the free dissemination of ideas and information, upon which our democracy depends, is threatened.

The predominance of network organizations is evidenced by their disproportionate share of the income of the broadcasting industry. The net operating income of all the stations and networks for the year 1938 was $18,854,784. Of this amount, $9,277,352 or about half of the total went to National and Columbia and their 23 owned or otherwise controlled stations. The remainder had to be divided among the 310 stations which were not on any chain and the 327 chain stations which were not owned or controlled by National and Columbia.

The predominance of network organizations is further evidenced by the fact that all but two of the 30 high-power, unlimited-time, clear-channel stations and all the high-power regional stations are on the National and Columbia networks. The inescapable conclusion is that National and Columbia, directed by a few men, hold a powerful influence over the public domain of the air and measurably control radio communication to the people of the United States. If freedom of communication is one of the precious possessions of the American people, such a condition is not thought by the committee to be in the public interest and presents inherent dangers to the welfare of a country where democratic processes prevail.

Except in those cases where a station is owned or controlled by a network, chain broadcasting is effectuated by means of contracts between the network organizations and its outlet stations. The existing contracts reveal many arbitrary and inequitable practices on the part of the networks. The provision that the outlet station cannot accept programs from any network other than the one to which it is bound by contract deprives the station of profitable business and the listening public of programs for which there is a demand. The practice of requiring stations to set aside all or a major portion of their broadcast time for the utilization of the networks, regardless of whether such time is used or not, places an undue burden upon the outlet station and lessens the ability of the station to serve the local needs of the community. The provision that nonnet-

work rates for national advertising business cannot be less than those of the network prevents the outlet station from entering into a healthy competition for advertising business. The provisions of the contract concerning the free use of the first converted hours, combined with low initial compensating rates for the next hours, result in an inequitable distribution of proceeds from network broadcasting. Whereas Columbia and National had aggregate network time sales of $44,313,778 for 1938, they paid to the 253 independently controlled stations on their networks only $12,267,560, approximately one-half of which was paid to 25 of these stations with a relatively strong competitive position based on the need of the networks for their particular facilities. Moreover, the contracts generally cover periods of time far in excess of the period for which the station is licensed and bind the outlet to network policies far beyond the expiration date of the license.

These arbitrary contractual arrangements are further reflected in the program policies of the network organizations. Outlet stations are required by their contracts to accept all commercial programs sent by the network organizations unless they are able to prove to the satisfaction of the networks that a particular program will not serve public interest. Since the outlet stations have only general advance knowledge of the content of the program, they have come to accept whatever the network chooses to forward to them. Furthermore, approximately 90 percent of the commercial programs sent by network organizations are produced by advertising agencies, so that the delegation of program responsibility by the licensee is carried one step further.

The record reveals a number of instances in which chains have gone even further than the regular network-outlet contract and have actually taken over the management of the station. Section 310 (*b*) of the Communications Act provides that licenses for radio-broadcast stations shall not be transferred or assigned unless the Commission shall decide that such transfer is in the public interest and shall give its consent thereto in writing. The Commission has already taken cognizance of this problem and is engaged in investigating these contracts.

The operation by National of two distinct networks with separate service to two stations in each of many cities is evidence of the complete domination of the licensee stations exercised by the chains through the network-outlet contract. It is also one of the most inequitable by-products of these contracts. The contracts which stations have with National do not specify to which of its chains the outlet is to be linked. The outlet station is only informed that it is a part of the National network. By virtue of this factor, National has the power to determine the economic fate of any of its outlets by arbitrarily assigning it to the prosperous Red network or to the unprofitable Blue network. These two networks have not been operated as competing units, with the benefit of competition accruing to the outlet station and the listening public, but as two parts of the National system with advantages to National only. The dual-network system has been utilized by National to prevent competing stations and other networks from entering communities served by it.

The predominance of the network organizations is further accentuated by their activities in the talent and electrical-transcription fields. The policy of Columbia and National of placing talent under the management of and exclusive contract to a network organization has the effect of limiting the efforts of much of the best talent in the country to network programs and of arbitrarily restricting the programs of independent competing stations, as well as the communities in which they are located. In the field of electrical transcriptions the National Broadcasting Co. has become a dominant factor. It has gained great competitive advantages in this field from its position in radio broadcasting, and its transcription activities have in turn, buttressed its position in the radiobroadcast industry. Since the unrestricted utilization of electrical-transcription programs is frequently an absolute necessity for independent stations lacking affiliation with a network, National's dominant position in the electrical-transcription field endangers the ability of these stations to serve the public interest adequately.

It seems apparent that the predominance of network organizations, the perpetuation of inequitable relations between such organizations and their outlet stations, and the lack of a more active competition within the radio broadcast industry are, in large part, the result of the contractual provisions that have been described in this report. The heart of the abuses of chain broadcasting is the network-outlet contract. It is the committee's considered opinion that many of the existing inequities and arbitrary practices will find correction in the reformation of these contracts.

APPENDIX C

Procedure for Oral Argument on Network Inquiry Report

Federal Communications Commission,
Washington, D. C., November 28, 1940.

The Federal Communications Commission today announced procedure for the oral argument on the committee network inquiry report made public June 12, 1940.

The hearing is scheduled for Monday and Tuesday, December 2 and 3, in hearing room A, Interstate Commerce Commission Building, starting at 10:30 a. m.

Each party will be allowed a maximum of 1 hour of argument on the issues of fact and policy raised in the committee report. The order of argument will be as follows: National Broadcasting Co.; Columbia Broadcasting System; Independent Radio Network Affiliates, Inc.; Don Lee Broadcasting System; Mutual Broadcasting System; Roy L. Albertson (WBNY); Rock Island Broadcasting Co. (WHBF); Voice of Longview (KFRO); World Broadcasting System, Inc.; Association of Radio Transcription Producers of Hollywood, Inc.; American Federation of Musicians; Independent Artists' Representatives; Associated Music Publishers, Inc.

In order to facilitate the oral argument, counsel are requested to consider the advisability and effect of the promulgation by the Commission of the following special regulations with respect to chain broadcasting. In several instances these suggestions are in the alternative, and the Commission desires to hear argument on the advisability and effect of alternative suggestions. It is to be understood that the regulations have not received the approval of the Commission, and are to be taken as suggestions by the Commission intended to focus the attention of counsel upon the issues raised in the report. It should also be understood that counsel are not in any way limited to a discussion of these regulations but may address themselves to any of the issues of fact or policy raised by the report of the chain broadcasting committee.

1–A. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which provides for or has the effect of establishing an exclusive affiliation with the network organization.

OR

1–B. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which provides for or has the effect of establishing an exclusive affiliation with the network organization; *Provided*, That such restriction shall not apply to licensees of stations located in or rendering primary service to cities receiving adequate primary service from five or more full-time stations.

2. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with any network organization which gives the network organization an option on the hours of operation of the licensee's station for the broadcasting of commercial programs (*a*) for more than 30 percent of the converted hours of operation in any city receiving adequate primary service from three full-time stations with comparable facilities; (*b*) for more than 20 percent of the converted hours of operation in any city receiving adequate primary service from two full-time stations with comparable facilities; (*c*) for more than 10 percent of the converted hours of operation in any city receiving adequate primary service from one full-time station; (*d*) for a total number of converted hours exceeding by more than 25 percent the converted hours during which such licensee has broadcast commercial programs transmitted to the licensee by the network organization during the 6 months preceding the effective date of the contract.

3-A. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with any network organization, the terms of which exceed in duration the effective period of the license granted by this Commission. For the purposes of this section, an agreement shall be considered as exceeding in duration the effective period of the license if the agreement gives either party an option to extend the contract beyond the termination of the license; *Provided*, That this restriction shall not be construed as preventing a licensee from entering into a contract with a network organization a reasonable period of time, not to exceed 30 days, in advance of the expiration date of the existing contract.

OR

3-B. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which gives the network organization any rights with respect to the renewal or cancelation of such contractual arrangement not given to the licensee.

OR

3-C. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization for a period longer than 2 years.

4. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which controls, restrains, limits, or in any other way interferes with the establishment of the rates to be charged by the licensee for the sale of available broadcast time to advertisers or other clients.

5. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, with a network organization which has the effect of or will result in the broadcasting of the programs of one network company by two or more standard broadcast stations rendering adequate primary service to the same city.

6-A. After January 1, 1942, no licensee of a standard broadcast station shall, directly or indirectly, own or be owned by, or be under common control with or have any interests in a chain or network organization; *Provided*, That the Commission will grant reasonable extensions of time in the event that the licensee is unable to meet the requirements of this restriction before its effective date.

OR

6-B. No person engaged in network broadcasting shall be licensed to operate more than two clear channel stations or more than three standard broadcast stations of all classes.

OR

6-C. No person engaged in network broadcasting shall be licensed to operate any standard broadcast station located in a city receiving adequate primary service from less than five full time standard broadcast stations.

7. No licensee of a standard broadcast station shall enter into any contractual arrangement, express or implied, which prevents the licensee from rejecting, for reasonable cause, any program offered by the network organization. The contracts between station licensees and network organizations shall expressly guarantee the right of program rejection by the licensee, and the judgment of such licensee shall be *prima facie* evidence of the reasonableness of rejection claims.

APPENDIX D

REGIONAL NETWORKS

The regional network field has been in a state of more rapid change than the national network field. Since the time of the Committee hearings, some regional networks have become defunct, and new ones have sprung up. Among the latter, for example, are the Carolina Broadcasting System, associated with Mutual; the Intermountain Network, associated with Mutual; the Minnesota Radio Network, associated with NBC; the Southern Network, associated with Mutual; and many others.[1] The summary which follows, accordingly, is not an exhaustive survey of regional networks, but rather a résumé of information concerning regional networks as developed in the record of this proceeding.

A. California Radio System

The California Radio System was formed November 21, 1936, to engage in network operations. It was originally operated by a partnership composed of McClatchy Broadcasting Co., wholly owned by McClatchy Newspapers, on the one hand, and Hearst Radio, Inc., and the Evening Herald Publishing Co., both controlled by William Randolph Hearst, on the other. The following stations composed the original network:

Station	Location	Owner
KEHE	Los Angeles	Evening Herald Publishing Co.
KYA	San Francisco	Hearst Radio, Inc.
KFBK	Sacramento	McClatchy Broadcasting Co.
KERN	Bakersfield	Do.
KMJ	Fresno	Do.
KWG	Stockton	Do.

The Hearst interests withdrew from the partnership in November 1937, and the McClatchy Broadcasting Co. acquired sole control of the network and operated it as one of its departments. Station KYA remained on the network under a contract of affiliation and the other Hearst station, KEHE, was replaced by KFWB in Hollywood. Subsequently, stations KFOX in Long Beach, KTMS in Santa Barbara, and KOH in Reno, Nev., were added to the network. Station KOH is owned by The Bee, Inc., a wholly owned subsidiary of McClatchy Newspapers.

The typical affiliation contract of the California Radio System, as of the time of the committee hearings, provided that the network should have free use of the affiliate's facilities for network commercial programs for 150 hours per year (not more than the equivalent of 3½ nighttime hours per week) and that the network should pay the station 50 percent of its rate for hours used in excess of the free time. The outlet placed all its time at the disposal of the network subject to 15 days' notice, except that the station could retain three daytime hours per day, which, however, were not specified. The station could freely reject any network sustaining program, but it was required by contract to accept network commercial programs subject only to the optional-time provisions. The contract had no date of termination, but either party could cancel on 6 months' notice.

California Radio System was not a contract outlet for any other network; but as of the time of the Committee hearings the four stations owned by McClatchy Broadcasting Co. and station KTMS served, individually, as contract outlets for NBC, and KOH was affiliated on an individual basis with CBS.

The net time sales of the network for 1938, after agency commissions, amounted to $109,848, of which $88,027 was paid to its four owned stations and $21,821 to the other five stations on the network.

[1] Broadcasting, *1941 Year Book*, pp. 308–309.

B. Yankee and Colonial Networks

The Yankee Network, Inc., was incorporated on April 12, 1930, as The Shepard Broadcasting Service, Inc.; its present name was adopted in December 1936. It is owned by John Shepard, Jr., through a holding company, the Winterstreet Corporation.

Colonial Network, Inc., was organized August 5, 1936. Its stock is divided equally between John Shepard III, president of Yankee, and his brother, Robert F. Shepard. At the end of 1938, 13 stations were affiliated with both Yankee and Colonial, 4 others were affiliated with Yankee only and 1 other with Colonial only. The reason for forming Colonial was to make full use of the 16-hour telephone circuit for which Yankee had contracted but which it was using only part of the time. Colonial was permitted to use the Yankee circuits whenever they were not being used by Yankee and was not charged for their use except when connection was made with an outlet station affiliated with Colonial but not with Yankee. The circuits were used by Yankee approximately 5 of the 16 hours per day and by Colonial the remaining 11.

At the end of 1938 the following stations, all but three independently owned, comprised the Yankee Network:

WNAC, Boston.*
WEAN, Providence.*
WICC, Bridgeport.*
WLBZ, Bangor.
WNBH, New Bedford.
WFEA, Manchester.
WLLH, Lowell-Lawrence, Mass.
WSAR, Fall River.
WRDO, Augusta, Maine.
WTIC, Hartford.
WTAG, Worcester.
WCSH, Portland, Maine.
WLNH, Laconia, N. H.
WNLC, New London.
WHAJ, Greenfield.
WCOU, Lewiston-Auburn, Maine.
WATR, Waterbury.

*Owned by Yankee.

The Colonial Network was composed of the above stations (except WNAC, WTIC, WTAG, and WCSH) and in addition Station WAAB in Boston, owned by Yankee. Station WNAC was the key station of the Yankee Network and Station WAAB was the key station of the Colonial Network.

Yankee as a network did not carry the programs of any national network, but nine of its outlets (WNAC, WEAN, WICC, WCSH, WTIC, WTAG, WFEA, WLBZ, and WRDO) were individually affiliated with NBC in 1938. Colonial, on the other hand, was associated with Mutual on a network basis as a "participating member."[2]

The network-outlet contracts used by Yankee and Colonial were, as a general practice, in the form of three-party agreements between the station licensees and both networks. They followed a more or less standard form which was varied in individual cases, particularly with respect to the amount of time under option to the networks, the compensation of the stations, the payment of telephone wire charges, and the amount of free time given to the networks.

The affiliation was not for a fixed term, but could be terminated by either station or network on 12 months' notice.

Yankee and Colonial took options on a substantial number of specified hours of most of their outlets; for seven stations, at the end of 1938, the option covered the entire broadcast day. The outlets agreed to broadcast, upon 28 days' notice, all network commercial programs offered during the time included within the option except those which, in the opinion of the station, were against public interest, convenience, or necessity.

Yankee and Colonial compensated their outlets for broadcasting commercial programs at a specified rate, generally 30 percent of the network rate for the station. In some instances, stations gave the networks a certain amount of free time varying from 1 to 3 hours per week. Stations were permitted to broadcast all available network sustaining programs without additional charge.

Most of the stations were bound by an exclusivity clause which read:

"The station agrees not to accept programs directly from any other network other than Yankee or Colonial without permission in writing from Yankee or Colonial, but will accept programs originating with other networks if fed to them by Yankee or Colonial."[3]

Yankee and Colonial granted territorial exclusivity to their outlets as a matter of practice, but not as a matter of contractual right.

---

[2] In 1940 Colonial became one of the stockholder owners of Mutual.

[3] It should be noted, however, that, as of the end of 1938, 9 Yankee outlets were affiliated also with NBC, apparently with the permission of Yankee.

The Yankee Network maintained a news service which gathered and edited news, an artists' bureau; and a weather service department in connection with weather forecasting for New England, New York, and Long Island.

The network net time sales of Yankee for 1938 amounted to $564,225, of which Yankee retained $428,434 (76 percent) and paid $136,791 (24 percent) to 13 contract outlets.

Colonial had network net time sales for 1938 of $190,738, of which it retained $114,764 (60 percent) and paid $53,680 (28 percent) to 3 Yankee-owned stations (WAAB, WEAN, and WICC) and $22,314 (12 percent) to its other outlets. Of those net time sales, $49,422 (26 percent) was derived from Colonial programs and $141,336 (74 percent) from Mutual programs.

C. Don Lee Broadcasting System

The Don Lee network was founded in December 1928 by Don Lee, Inc., a corporation engaged principally in selling automobiles, when it connected its two owned stations (KFRC in San Francisco and KHJ in Los Angeles) by a telephone circuit for chain broadcasting. During that month the three stations owned by McClatchy newspapers (KMJ in Fresno, KWG in Stockton, and KFBK in Sacramento) joined the Don Lee Network, and after November 14, 1930, when McClatchy newspapers acquired Station KERN at Bakersfield, that station became affiliated with Don Lee. In 1933 Station KOH, at Reno, also owned by McClatchy newspapers, joined Don Lee.

In September 1929 Don Lee, Inc., became the CBS representative on the Pacific coast and furnished its outlets with CBS programs. Don Lee, Inc., expanded its network coverage of the Pacific coast in 1932 by adding Stations KOIN in Portland, KOL in Seattle, KVI in Tacoma, and KFPY in Spokane as contract outlets. In May 1931, Don Lee, Inc., acquired control of Station KDB in Santa Barbara and the ownership of Station KGB in San Diego and both of those stations became Don Lee, Inc., operated stations, serving also as outlets for CBS.

Don Lee's relationships with McClatchy newspapers and CBS continued until December 1936, when the five stations owned by the McClatchy interests left Don Lee to become associated with NBC and California Radio. CBS at the same time terminated its affiliation with Don Lee and established its own operations on the Pacific coast, taking over directly the contracts with four stations previously associated with Don Lee (KOIN, KOL, KVI, and KFPY). Don Lee thereupon became a "participating member" of Mutual and transmitted Mutual programs to its outlets.[4]

Since June 1932, network operations and the ownership of Stations KFRC, KHJ, and KGB have been vested in the Don Lee Broadcasting System, a wholly-owned subsidiary of Don Lee Holding Co., which in turn is wholly owned by the estate of Don Lee (deceased). The estate also controlled Station KDB in Santa Barbara through ownership of all the stock of its licensee.

Don Lee System expanded beyond California into the Pacific Northwest in the fall of 1937 through a contract with Pacific Broadcasting Co. During 1938 the Don Lee System was composed of 28 outlets. Fourteen of these, located in Washington and Oregon, received Don Lee network service through Pacific. Of the other 14, all located in California, 11 served the Don Lee System under direct contracts and the other 3 were owned by the system. One of the stations under direct contract (KDB), moreover, was under common ownership with the Don Lee System.

Don Lee System furnished its outlets with 16 hours of commercial and sustaining programs daily. From 16 to 20 percent of the Don Lee commercial programs were received from Mutual and the balance were furnished by Don Lee. The outlet stations of the Don Lee System had no direct contractual relations with Mutual; they received Mutual programs only through the facilities of Don Lee. Indeed, Mutual offered service to Pacific coast stations only through Don Lee.

The typical Don Lee affiliation contract, as of the time of the committee hearings, was for a specified term, with three additional terms of 1 year each, provided both parties gave notice to extend 90 days prior to expiration. The contract with Pacific Broadcasting Co., however, was for 5 years, but either party could terminate at the end of any year if the net income of Pacific from network business did not equal the cost of telephone lines.

The stations optioned all their time to Don Lee for network commercial programs. They were not required, however, to take any network programs which

[4] In 1940 Don Lee became one of the stockholder owners of Mutual.

would interfere with any local program of major public interest, convenience, and necessity.

Don Lee was generally entitled to free time over its outlet stations not exceeding 2 hours per week. For commercial time in excess of the free time, Don Lee paid the California stations with which it had individual affiliation contracts specified percentages of their network rates. The arrangement with Pacific was different. The latter network paid telephone-circuit expenses north of San Francisco and received all revenue collected by Don Lee from advertisers for the use of Pacific facilities until these expenses were covered. Thereafter it received from Don Lee 85 percent of such net revenue. Don Lee supplied sustaining programs to its outlets at no addition al charge.

The affiliates agreed not to permit the use of their facilities by any other broadcasting company, system, or network, and, in turn, Don Lee agreed not to send its programs to other stations located in the same city as any of its outlets, or to any stations in Oregon or Washington other than the outlets of the Pacific Broadcasting Co.

The net time sales, after agency commissions, of Don Lee System and its 4 controlled stations for 1938 were $853,333, of which $417,324 was derived from Don Lee network time, $129,753 from Mutual network time, and $306,256 from nonnetwork sales of the 4 stations. The 28 stations composing the network during 1938 received $651,352 from networks, of which $547,077 (84 percent) went to the 4 Don Lee owned stations and $104,275 (16 percent) to the 24 independently owned outlets.

D. Pacific Broadcasting Co.

The Pacific Broadcasting Co. was incorporated in October 1937, after the Don Lee System became an outlet for Mutual, for the purpose of establishing further outlets for Mutual and Don Lee programs among a group of stations in Oregon and Washington.

The three shareholders of Pacific had interests in six stations in Washington and Oregon,[1] four of these (KMO, KIT, KOL, and KGY) became Pacific network outlets. The other two, KHQ and KGA[2] in Spokane, remained outlets for NBC.

During 1938 Pacific had 14 outlets: 9 in Washington and 5 in Oregon.

Pacific had no studio or other program production facilities. It relied in the main upon Mutual and Don Lee and to a lesser extent upon its contract outlets for network programs.

By contract with Don Lee, Pacific had the exclusive right to transmit Mutual and Don Lee programs in Oregon and Washington, and it agreed not to carry the programs of any network other than Don Lee and Mutual. By using the programs made available to it by Don Lee, Mutual, or its outlets, Pacific supplied its network with 16 hours of programs daily. The typical affiliation contract between Pacific and its outlets, as of the time of the committee hearings, required the station, upon 10 days' notice, to accept network commercial programs during any period of the broadcast day, except that the station was not required to take any program which would interfere with any locally originated program of major public interest or public necessity. The term of the contract was for 1 year, but Pacific had an option to extend for 4 additional terms.

Pacific contracted for and paid the telephone circuit expenses of its main line, including the line to the Don Lee System at San Francisco. The stations paid the telephone wire charges for circuits connecting them with Pacific main circuits. The outlets agreed to give Pacific 7 nighttime hours of free time per

[1] See the following table:

Name	Station	Percent of ownership
Carl E. Haymond	KMO, Tacoma	99.
	KIT, Yakima	100.
Louis Wasmer	KHQ, Spokane	99.
	KOL, Seattle	42.
	KGY, Olympia	49½.
	KGA, Spokane	(Lessee and licensee, owned by NBC.)
Archie G. Taft	KOL, Seattle	48⅓.
	KGY, Olympia	49.

[2] While not a Pacific contract station, KGA acted as a Pacific network outlet for certain commercial programs.

week (or their equivalent) for network commercial programs and 2 additional free hours at any time for network promotional programs. For all time used for commercial programs, in excess of the free time, Pacific paid its outlets specified rates. Sustaining programs were available to outlet stations at no additional charge.

The stations agreed not to permit any other broadcasting company, system, or network to use its facilities; and Pacific agreed not to send its programs to any other station in the same city.

The total net time sales, after agency commissions, of the 14 outlets of Pacific for 1938 amounted to $580,602, of which $36,468 (6 percent) was received from Pacific, the remainder being nonnetwork net time sales.

E. Michigan Radio Network

Michigan Radio Network was established on January 1, 1933, as an operating department of King-Trendle Broadcasting Corporation.[1] King-Trendle had been incorporated on April 25, 1930, by John H. King and George W. Trendle, who had previously been engaged in the operation of motion picture and vaudeville theaters. On May 7, 1930, King-Trendle purchased station WXYZ in Detroit; on March 24, 1931, it leased station WOOD at Grand Rapids; and on December 21, 1931, it leased station WASH at Grand Rapids, which had been sharing time with WOOD. Thereafter, King-Trendle operated the two stations in Grand Rapids as one station, WOOD-WASH.

Michigan Radio Network furnished programs from station WXYZ in Detroit to its contract outlets within the State of Michigan. From 1933 to the date of the Committee hearings the following stations were affiliated with the network:

WXYZ, Detroit.	WELL, Battle Creek.
WOOD–WASH, Grand Rapids.	WKZO, Kalamazoo.
WIBM, Jackson	WBCM, Bay City.
WFDF, Flint	WJIM*, Lansing.

*Joined network July 1, 1934.

On September 29, 1934, station WXYZ became one of the original four "member" stations of Mutual; but the station withdrew from Mutual on September 29, 1935, to join NBC's basic Blue Network. The NBC affiliation contract provided that King-Trendle might furnish to the stations on the Michigan network NBC's commercial programs sent to WXYZ, and also the sustaining programs, except the "Music Appreciation Hour" conducted by Walter Damrosch, the program on Sundays at noon, and all speeches but those by the President of the United States. At the same time, station WOOD–WASH became affiliated with NBC as an optional station.

The standard affiliation contract between Michigan Network and its outlets, as of the time of the committee hearings, was for a term of 1 year, but it could be canceled if a majority of all stations on the network and the network agreed.

The contract provided that the outlet, upon 2 weeks' notice, must accept any network commercial program offered during any hour of the broadcast day, except programs the broadcasting of which would not be in the public interest, convenience, and necessity. The station was permitted to reserve for itself not more than one and one-half hours each evening between 6 p. m. and 10 p. m. for local broadcasting, provided that such periods did not conflict with network commercial programs offered.

The outlet granted the network 1 hour per day before 6 p. m. and 1 hour after 6 p. m. which the network could sell commercially and for which the outlets did not receive compensation. For time used commercially by the network in excess of the 2 free hours per day, the station was paid a specified rate. Michigan Network paid telephone circuit expenses and supplied sustaining programs without additional charge.

The contract provided that the station would not permit the use of its facilities by any other broadcasting chain or network; and the station also agreed not to sell time to third persons at a rate less than that specified in its contract with Michigan Network.

The hours of commercial programs sent to its outlets by Michigan Network did not, as a rule, exceed the number of free hours given to the network. More than one-half of all programs sent to its outlets by Michigan radio were those received from NBC.

[1] This company was originally incorporated under the name of Kunsky-Trendle Broadcasting Corporation. Its name was changed to King-Trendle Broadcasting Corporation in 1936.

The network time sales of Michigan Network for 1938 amounted to $133,314, of which $83,853 (62.5 percent) was paid to its three controlled stations and $49,461 (37.5 percent) was paid to its six contract outlets, whose total net time sales amounted to $288,238. The net time sales of the three stations operated by Michigan Network amounted to $651,645 for 1938, of which $113,203 was received from NBC.

In 1935 King-Trendle entered into an agreement with NBC's transcription bureau whereby NBC transcribed Michigan's Lone Ranger program, and leased the transcriptions to stations throughout the world except specified major trade markets in which Michigan Network reserved the right to lease the transcriptions.

F. Texas State Network

Texas State Network was incorporated on August 1, 1938, to render program service to stations within the State of Texas and to provide a state-wide advertising medium. Network operation commenced September 15, 1938.

At the time of the committee hearings, Texas State had 23 outlets, all independently owned. One (KPLT at Paris) was operated by Texas State under a management contract; the remaining 22 served as contract outlets. Four of the stations also served as outlets for NBC and one for CBS.

Texas State was an "affiliate" of Mutual and furnished Mutual programs to its outlets.

The standard Texas State affiliation contract was for 1 year, with an automatic extension for a period of 2 more years unless the network or the outlet gave notice to the contrary. The outlet agreed, upon 28 days' notice, to carry network commercial programs at any time during the 7 specific hours* optioned to the network, except that, because of "its public responsibility," it could reject a network program, the broadcasting of which would not be in the public interest, convenience, and necessity.

The network agreed to provide the outlet with 17 hours of live talent programs per day. There was no particular charge specifically allocated to sustaining programs; but most of the outlets agreed to pay Texas State $500 per month in consideration of network affiliation; a few paid somewhat less. In addition, each station gave Texas State 5 unit hours each week free for network commercial programs. Texas State maintained network telephone lines at its own expense and paid each outlet the station card rate less agency commission of 15 percent and less a network selling commission of 15 percent, for network commercial programs, in excess of the free time.

The contract contained a provision, similar to the provision in the standard NBC affiliation contract, which gave the network the right to reduce station compensation if the station sold time to advertisers at rates lower than those charged by the network. It also prohibited a station from altering its network station rate or station card rate without the consent of the network and its outlet stations.

The net times sales, less agency commissions, of Texas State for the period from September 15, 1938, to January 31, 1939, amounted to $79,468, of which $47,335 (59 percent) was paid to its outlets. During this period Texas State collected $57,082 from its outlets under the arrangement whereby the stations agreed to pay the network $500 per month. That amount represented approximately 120 percent of the amount Texas State paid to the stations.

G. Arrowhead Network

Arrowhead Network is a trade name given by Head of the Lakes Broadcasting Co. to its three owned stations located in northern Minnesota, a section known locally as the "Arrowhead" area. The stations were WEBC in Duluth, WHLB in Virginia, Minn., and WMFG in Hibbing.

The three stations were under one ownership and were interconnected for mutual program-service purposes, the entire benefits of which inured to the owner. For 1938 the net time sales, after agency commissions, of the three stations were $239,276.

---

* 7:30 a. m. to 9:30 a. m.; 11:30 a. m. to 1:30 p. m.; 5:30 p. m. to 7:30 p. m.; and 9:00 p. m. to 10:00 p. m. Four outlets of Texas State were also affiliated with NBC. Since their arrangements with Texas State were subordinated to their relationship with NBC the standard Texas State affiliation contract was modified, particularly with respect to its optional-time provision, to apply to them.

H. Empire State Network, Inc.

Empire State Network, Inc., was incorporated on September 23, 1938, and ceased operations on November 7, 1938. During its 43 days of operation it sold time principally for political speeches.

The stations affiliated with the network were:

WABY, Albany.
WIBX, Utica.
WSAY, Rochester.
WMBO, Auburn.
WBNY, Buffalo.
WNBF, Binghamton.
WHN, New York.

Most of the stations granted the network 2 hours of free time per week and received from the network 30 percent of the revenue from sales over their facilities. The total revenue of the network for its 43 days of existence was $12,927.

I. Inter-City Broadcasting System

Inter-City Broadcasting System is a trade name selected in 1935 when the owners of stations WMCA in New York and WIP in Philadelphia agreed to exchange their programs by the use of telephone circuits. Subsequently, other stations joined the group, which was connected by permanent telephone lines for the entire broadcast day of 16 hours. The stations which served as outlets for this program service were:

WMCA, New York.
WPRO, Providence.*
WMEX, Boston.
WLAW, Lawrence, Mass.
WIP, Philadelphia.
WDEL, Wilmington.
WGAL, Lancaster.
WCBM, Baltimore.
WORK, York,
WOL, Washington.†

*Affiliated with CBS; broadcast only occasional Inter-City programs.
†Affiliated with Mutual; broadcast only occasional Inter City programs.

Station WMCA had contracts with each of the outlet stations and served as selling agency for the group. It made all contracts with advertisers for programs produced in its studios and did the billing for all the stations. The charges to advertisers for network services were the station rates of the individual stations from which WMCA retained, as its commission, an amount ranging between 10 and 15 percent of the billing. Each station except WPRO and WOL was required to clear unsold time for Inter-City commercial programs.

J. Pennsylvania Network

Pennsylvania Network was formed during 1938 as a means of providing revenue from selling the time of a group of stations in Pennsylvania to political parties, and it ceased operations with the conclusion of the political campaign of 1938.

Station WCAU in Philadelphia acted as selling agent for the group. There were no affiliation contracts; sales in each instance were subject to acceptance by the stations; and revenue and the expense of telephone circuits (which were provided for temporary periods) were shared *pro rata* by the stations.

K. Texas Quality Network

Texas Quality Network, a cooperative sales group, was formed in September 1934. The network was not a corporation and had no headquarters nor employees.

The stations affiliated with the network were:

WFAA, Dallas
WBAP, Fort Worth } share time.
KPRC, Houston.
WOAI, San Antonio.

Since each station in the group was under a separate affiliation contract with NBC, Texas Quality programs were contracted for only at hours which did not conflict with NBC programs.

The relations between the stations affiliated with Texas Quality were rather loose. Any station could terminate its membership in the network on 2 weeks' notice. Each station acted as sales agent for the group, soliciting business at a

price equal to the sum of the rates of the stations plus the telephone circuit cost involved. Sales were subject to acceptance by each of the stations in the group in every instance. Contracts were made by advertisers directly with each of the stations; but the soliciting station billed the advertisers and distributed the proceeds pro rata to the other stations after deducting agency commissions, its own commission, and time charges, and telephone expenses. The network kept no books except a record of telephone line expenses, maintained at Station WFAA, which amounted to $2,690 monthly.

L. Virginia Broadcasting System, Inc.

Virginia Broadcasting System, Inc., was incorporated on February 1, 1936. Its stock was owned in equal shares by the owners of the following five stations in the State of Virginia, which comprised the network:

WRNL, Richmond.	WBTM, Danville.
WCHV, Charlottesville.	WGH, Newport News.
WLVA, Lynchburg.	

There were no written affiliation contracts. Each station acted as sales agent for the group, soliciting business at a price equal to the sum of the rates of the stations to be used, and the sales were subject to acceptance by the individual stations in each instance. The soliciting station furnished the program service, billed the advertiser for the service furnished by the group, and distributed the proceeds to the other stations after deducting its own time charges.

For the first 3 months of operation the group was permanently connected with a telephone circuit for 16 hours per day. That service was abandoned in May 1936 because of the expense involved, and since that time the network has existed only for the purpose of broadcasting special events.

Additional Views of

COMMISSIONERS T. A. M. CRAVEN AND NORMAN S. CASE

IN THE MATTER OF CHAIN BROADCASTING

(COMMISSION ORDER No. 37—DOCKET No. 5060)

TABLE OF CONTENTS

	Page
PART I:	
GENERAL	115
PART II:	
DISCUSSION OF CERTAIN IMPORTANT FACTORS	119
(A) Conflicting Trends	119
(B) Competition	120
(C) Licensing Policy	125
(D) Economic Stability	128
PART III:	
SUMMARY OF SUPPORTING FACTS	130
(A) General	130
(B) Organization of Broadcasting Facilities	130
(C) The Economics of Broadcasting	132
PART IV:	
CONCLUSIONS	137

ADDITIONAL VIEWS OF COMMISSIONERS T. A. M. CRAVEN AND NORMAN S. CASE

GENERAL

All members of the Commission recognize that improvements in the present broadcast service as well as in the organization thereof are not only possible but also desirable. However, the minority disagrees with the proposals which the majority has adopted as a method of securing improvements. We fear that the proposals of the majority will result inevitably in impaired efficiency of the existing broadcast organization of the country. This system has been developed as a result of practical experience over a period of years. In the main it is operating very well in the public interest. Undoubtedly it provides the public with the best broadcasting service in the world. Naturally, there are faults which may need correction. However, some of the corrective processes suggested by the majority may easily result in faults which are far more basic than the known defects which exist today. Furthermore, it appears that insufficient recognition is given to the practical considerations which are inherent in the American system of broadcasting and which cannot be circumvented. It seems that no weight is given to the fact that broadcasting is dynamic and not static. No consideration seems to be given to the probable effect of new developments. Also inadequate recognition is given to the effect of the natural and economic limitations within which broadcasting must operate. Likewise, inadequate recognition is given to the natural laws which influence basically the manner in which broadcasting renders a social service to the public of America.

No member of the Commission condones any form of monopoly which concentrates power contrary to the public interest or which constitutes unreasonable restraint of competition. However, the majority appears to suggest that "unlimited" competition is the most important factor in securing improvements in radio broadcasting service and proposes to issue regulations the effect of which will prohibit certain contracts which now exist between chain companies and their affiliates. The intent of these regulations is to ban all arrangements which limit the ability of any broadcast station licensee to engage at any time in any and all forms of competition. While the minority insists upon competition they suggest the principle of "Free competition accompanied by good radio service to the public" rather than competition which affects adversely program service.

The minority is of the opinion that the most important problem confronting the Commission may be stated briefly as follows:

Considering the necessity of a balanced radio broadcast service of interest to and in the interest of the public, and recognizing the

natural limitations inherent in radio, how can greater equality of opportunity be extended to persons desiring to utilize radio as a media of broadcasting information to the public?

The solution of the problem requires a broad viewpoint as well as a balanced consideration of at least all of the following factors which among others contribute to broadcast service in the interest of the public:

1. The establishment of a "free radio" insofar as is practicable within inherent natural limitations.
2. Good programs.
3. An equitable distribution of facilities to states and communities.
4. Diversification of control of radio stations among many licensees.
5. Competition.
6. Efficiency of program distribution to the nation as a whole.
7. Operation of each station in the public interest rather than for the private interest of the licensee.
8. Natural economic laws of supply and demand.
9. Principles of sound business.

A limited approach, or conclusions based upon over-emphasis of one phase of the problem, will result in unsound administration and unfortunate consequences to the radio service to which the public is entitled. More specifically, we fear that the revolutionary change proposed by the majority will result in the destruction of the present excellent national program distribution system and the substitution therefor of some new kind of system, the effects of which the majority does not adequately visualize.

It is axiomatic that unlimited availability of the few existing radio facilities and efficient national program distribution cannot both be attained at the same time. There is no open-market condition in the business of broadcasting as in other businesses. Nature has determined that. To attempt to circumvent these basic economic laws is fraught with peril to an industry which has hitherto achieved a marked degree of success. Regulation in disregard of economic laws may foster a situation in which competition among competently managed networks would be replaced by an unwholesome conglomeration of opportunistic "time brokers" catering to an aggregation of local monopolies in the various towns and cities of the nation. This will result in—

(1) Responsibility for carrying sustaining programs of public importance would be so diffused that such service would likely become nobody's business and the difficulty in clearing time on a national network would become an almost insurmountable task.

(2) The incentive would be removed for the origination of such sustaining features as the European war broadcasts, the American Farm and Home Hour, the Town Meeting of the Air, Toscanini, etc. If the proposals of the majority are enforced there can be no logical determination of who will pay for such service or how it will be developed.

These considerations and other far-reaching adjustments that would be involved would plunge the American broadcasting system from the *known* of good public service to the *unknown* in which all the consequences cannot be foreseen. It is, therefore, no exaggeration to predict that the decision of the majority instead of resulting in "free

competition", would more likely create "anarchy" or a kind of business chaos in which the service to the public would suffer.

The majority appears to conclude that it is necessary to exert control over certain business policies of radio station licensees in much the same manner as has been proven suitable for public utilities other than radio. However, in arriving at this conclusion there appears to have been no weighing of the advantages and the disadvantages of the present broadcast structure in terms of good program service to the public. Hence, no conclusions based upon evidence in the record have been made of the reasonableness of the present practices of the industry. For 14 years, existing contract arrangements have been enforced both through formal and informal agreements, and broadcasting in America has achieved greater progress than in any country in the world. The record does not disclose that there is *unreasonable* restraint of competition resulting from certain contracts which the majority proposes to prohibit.

It is possible that the majority in its desire to regulate one facet of the broadcast problem has overlooked some of the other important considerations and hence may have made impossible the attainment of an ideal objective. For example, in asserting jurisdiction to regulate the business practices of broadcast station licensees the majority may have assumed certain power which is not delegated to it under the law. In broadcasting, Congress evidently intended to apply the constitutional doctrine of a "free press". In so doing, Congress recognized that the advantages of a "free radio" were more important than the advantages of the type of regulation heretofore considered necessary in the public utility field. As evidence of their intent, Congress specified that radio broadcasting should not be classed as a common carrier even though licensed by the Government to operate as a form of monopoly in the public domain. The type of regulation specified by Congress for broadcasting clearly envisioned that the Communications Commission should not regulate the programs, the business practices or business policies of broadcast station licensees. Congress specified a type of regulation designed to maintain its policy of a "free radio". This type of regulation differs from that applied to other private business operations in the public domain.

Thus, the question of the power of the Commission to regulate the business phases of broadcasting may be approached from the standpoint of public interest. Congress required that radio, like the press, must be free from those restraints of Government which hamper free expression and which control what may be said or who may speak. The most important function of Government should be to facilitate the attainment of a "free radio". Therefore, it may be argued that if the licensing authority interferes with the business practices of persons engaged in broadcasting, there is concentrated in a single Government agency a power which must lead inevitably to undesirable restraints upon a "free radio". Such concentration of power in Government is just as contrary to public interest as the concentration of control of broadcast stations among a limited number of licensees.

It is obvious that if all the stations in the country were licensed to one person, that person, even though regulated by the Government, would have vast power to control an important media of information,

Even though such person had the best of intentions for the welfare of the public, his would be the sole judgment which determined how radio would be utilized to influence public opinion. Such an extreme is unthinkable. On the other hand, if we had innumerable licensees and therefore innumerable competitive judgments, all under the autocratic regulatory supervision of a single Government agency vested with final and unrestrained power of life and death over the economic destinies of each licensee, we likewise would have an intolerable situation, however well-intentioned such Government agency may be. It was for this reason that Congress provided not only for a diversification of control of radio broadcasting among licensees, but also for diversification of jurisdiction among various regulatory agencies of Government. It was not intended by Congress that any licensee merely because he was a radio broadcaster should be exempt from the application of laws directed to business enterprise generally. The Department of Justice and the Federal Trade Commission as well as other Government agencies include broadcasters within their jurisdiction when administering the laws relating to all business enterprise. Congress empowered the Communications Commission to regulate only that phase of radio operation which relates to licensing stations. This embraces a fair and equitable distribution of radio facilities to states, communities and persons in a manner which insures diversification of control among many licensees, as well as a good program service of interest to and in the interest of the public. It likewise includes the regulation of technical aspects of operating stations and certain other phases of radio operation affecting public interest which are not under the jurisdiction of other agencies of Government. The Commission is charged with the responsibility of determining the qualifications of licensees to operate radio broadcast stations, but the Commission does not have responsibility to determine the guilt of licensees for violations of law, the administration of which is not under the direct jurisdiction of the Communications Commission. If licensees of radio stations are found guilty of violation of such other laws, the Commission's responsibility in the premises rests solely as to the qualifications of such licensees to operate stations in the interest of the public.

If some form of monopoly exists in radio broadcasting which is contrary to the best interests of the public, it should be remembered that the Commission has licensed all broadcasting stations in the United States after finding time and time again that each of the licensees was operating his station in the public interest. Therefore, if the Commission has erred in the past, it can now correct the mistake by exercising in individual cases the licensing power delegated to it under the Communications Act of 1934.

The Commission should encourage the organization of independent, highly competitive national networks. However, if there are limitations or barriers to the establishment of additional competitive networks, the Commission need not and should not promulgate rules the effect of which would destroy all existing systems, merely to provide some other private enterprise with an opportunity to capture the revenues of broadcasting. There are better ways to encourage and secure additional competition.

II. DISCUSSION OF CERTAIN IMPORTANT FACTORS

(A) CONFLICTING TRENDS

The current scarcity of channels to accommodate the demands therefor imposes a severe limitation to freedom of action in solving some basic problems. This limitation forces a choice among conflicting trends. Some advocates of changes in the operation or of regulation of broadcasting fail to consider the inevitable results of this natural limitation. Consequently, needless misconceptions arise, as well as suggestions of panaceas which cannot solve the problem in any practical manner. Furthermore, some are prone to accept current conditions in broadcasting as static, in spite of the fact that the technical and performance bases are dynamic. None can prophesy the future of technical progress. Therefore, misconceptions of basic factors are hazardous and may tomorrow constitute artificial barriers to the very improvements which today appear desirable.

The more important conflicting trends in the dynamic field of broadcasting include:

(1) Inhibitions against patterns of centralized operation conflict with efficient program distribution on a national scale. There is a temptation to over-emphasize local interest to the detriment of national interest, and vice versa. The real goal should be efficiency of service from a national standpoint rather than a vague objective which fosters a conglomeration of local units uncoordinated for rendering a truly national service.

(2) A broadcasting station is licensed to render a public service as contrasted to a private service, even though it is operated by private enterprise for profit. Licensees naturally emphasize their rights under a license and are under continuous economic pressure to broadcast programs that will win and hold listeners. Persons in Government, on the other hand, assert that licensees do not discharge all the responsibilities which are necessary to operate a station in the interest of the public, particularly with respect to affording opportunity for balanced presentations of debatable social questions. There cannot be sufficient facilities, nor is there sufficient time for everyone to use a broadcasting station to express to the public particular social or economic philosophies. It is essential, therefore, that broadcast licensees exercise wise judgment as to the desires of the listening audience and in choosing the speakers who may appear before the microphone.

It is equally important that Government should not undertake to impose in advance any standards in this field. Such course is fraught with such obvious peril that further discussion is unnecessary.

The best method of judging whether a licensee has utilized his facilities in the interest of the public is to examine the manner in which the station has operated, and then determine whether the judgments exercised meet a rational test of public interest.

(3) The hours of a broadcast day automatically limit the number of persons who can use facilities. Therefore, the greater the num-

ber of stations in any community the broader the opportunity for all desiring to use such facilities. However, as the number of stations in a community of any given purchasing power increases, the revenues available are diluted. If there are too many stations the quality of service rendered by each may be affected adversely. At least, some will be forced to render inferior service because of inadequate income. Thus we are faced again with a choice between opposite trends. The present policy of the Commission is to encourage competition regardless of adverse economic effects. This general concept of the law is at variance with the natural laws which force a limited market.

Unfortunately, efforts to apply a concept of unlimited competition in the teeth of a technical limitation in the availability of channels encourages concentration of facilities in larger communities at the expense of smaller communities. This trend is augmented by the economic tendency to concentrate facilities in large centers of population where there is greater purchasing power to support profitable stations. The desirable social objective to render radio service to all listeners, both rural and urban, at times conflicts with the pressure to make multiple transmission facilities available in all of the metropolitan centers of the nation. These factors unless controlled cause inequitable distribution of facilities to the various States and communities, contrary to the requirements of the Communications Act of 1934. Thus, a policy of unlimited competition is in conflict with the legal mandate to distribute facilities fairly, efficiently and equitably throughout the nation. This dilemma becomes even more difficult to resolve because allocation of facilities to any area is dependent upon voluntary applications. It is obvious that unlimited competition among stations in any community is impractical when the total number of facilities available for the entire nation is limited. Emphasis, therefore, should be placed upon an equitable distribution of facilities to the various communities of the nation, rather than upon an impractical objective of unlimited competition which can never be wholly achieved because of physical facts. Furthermore, if primary emphasis is placed upon the equitable distribution of facilities to the communities of the nation, there need be no concern for any destructive local competition until the radio technique has advanced to the point where many more channels are available. Moreover, if this course is followed, it should facilitate the establishment of additional networks if the economics of the situation justify such a development.

(B) COMPETITION

(1) In order to obtain a common basis of understanding, it is necessary to agree that in the legal sense unlawful monopoly is confined to unreasonable practices which restrain trade or limit competition in violation of the anti-trust statutes. Competent legal authorities hold that unlawful monopoly is the acquisition of something for one's own self, not necessarily the whole of a given commodity or the whole commerce therein, but control at least of a part thereof sufficient to constitute withholding from the public the right to deal therein in an open market. In broadcasting, however, we cannot start with a premise of an unlimited market. Natural laws limit the availability of radio facilities not only in each com-

munity but also in the nation. Therefore, we must frankly recognize in considering the regulatory problem that we are dealing with a phenomenon limited by natural causes. The paramount objective should be "public interest, convenience and necessity" as related in terms of the best radio service to the nation as a whole.

(2) Intensive competition exists in broadcasting within the natural restrictions of a limited number of facilities. Not only do major networks compete vigorously with each other for the advertising dollar, but also all stations, including those affiliated with networks, compete with the networks. Furthermore, each individual station in a community or region competes with every other station in that community or region. Moreover, radio as a whole is in stern competition for the advertising dollar with other media.

In 1938, 350 of the 660 commercial stations in the country were affiliated with one or another of the major networks. During the time utilized for network programs, competition on the part of these stations is limited to that competition occurring among the networks themselves. A station affiliated with a network has optioned certain time to the chain company and thereafter does not engage in competition with the chain company for such of the time as is used for commercial programs. However, the station still competes for "spot" advertising from sponsors who use the networks with which the station is affiliated. The competition of networks is subject to dynamic changes. Stations frequently change their connections with networks and will continue to shift affiliations as occasion demands. Since 1938 the number of network stations has increased.

(3) The necessity of efficient network organizations for the distribution of broadcast programs of national interest is axiomatic. Cohesive organizations which are always available for broadcasting intelligence to the entire nation provide the most effective force for national unity and may become absolutely essential in times of national emergency. There should be as many of these national network organizations in full competition with one another within the sphere of our economic system and as is practicable within the physical limitations imposed by nature. In like manner, it is highly desirable to encourage the organization of Regional and State networks. Without such competitive organizations for program distribution the very vitality of radio would disappear. Network competition for listeners has been the greatest progressive factor in the development of American broadcasting. Elimination of network programs is unthinkable. Government policies which might handicap efficient organization for network program distribution undoubtedly would create a public outcry against the depreciation in program service which would be a logical consequence.

These factors are of practical importance not only to the public, but also to the broadcaster, both when he desires to render service to the public as well as when he desires to sell the service of his station. They are of particular importance to the advertiser who desires to utilize the advantages of radio as a media to increase the volume of business. This practical situation confronting everyone interested in broadcasting should be recognized if the public is to secure good broadcasting service as well as to benefit indirectly from the standpoint of economics in the form of the cheaper costs inherent in vol-

ume production and distribution of goods. Therefore, in dealing with the broad question of possible monopoly or restraint of trade in broadcasting, the fact that unlimited availability of facilities and efficient program distribution cannot both be attained must be clearly recognized. We must likewise recognize that in broadcasting there cannot be the "open" market condition of other businesses. Nature has determined this.

(4) Certain practices of networks have been the subject of complaint aside from the contract arrangements between the chain companies and their affiliates. These include the operation of talent agencies, concert bureaus and transcription and record companies. It was a natural and logical development that in the early days of network broadcasting the networks should attempt to develop their own sources of talent. The record in this proceeding indicates that network companies utilize many sources of talent and make available to all the artists whose services are under exclusive contract to their management agencies. However, it does appear that there exists some conflict in the networks' position of being both buyer and seller of the services of the talent which they manage. It is believed that this Commission is without jurisdiction to remedy any abuses which may exist. Therefore, it appears proper to advise the network companies that the showing made in these proceedings indicates at least an opportunity to engage in unfair trade practices. Under such circumstances, the networks should be given an opportunity to divest themselves of these activities, or, in the alternative, the entire record should be referred to the Federal Trade Commission for a more thorough investigation upon which it could base findings and appropriate action.

However, it should be emphasized that network organizations should not be prevented from developing new talent. The record of this proceeding fails to disclose any great public concern about existing practices and it has not been established that the public has been injured because network companies maintain talent agencies. Rather, the complaints come from competing agencies who allege that the management of talent by networks who are also users of talent, results in unfair trade practices. The Federal Trade Commission is the appropriate agency to receive such complaints and make a determination. This Commission cannot pass upon these matters and, as related to broader questions involved in these proceedings, this problem is of relative insignificance. From this record it would appear that the desirable objective is to maintain an "open market" for talent with a minimum of restriction of opportunities for performers. With respect to the manufacture and sale of transcriptions and records by companies operating networks, a similar question may be involved. The complaints of competitors should be directed to the appropriate agency, namely, the Federal Trade Commission.

(5) The most important and frequent allegations of monopoly in broadcasting spring from the contractual arrangements between the chain companies and their affiliates. Under the standard form of contract an affiliate agrees to restrict the use of a station to a particular national network and to option a large portion of the time of such affiliate regardless of whether all of such time is used by

the chain company. It is claimed by some that the exclusive and the option clauses in certain of the chain contracts have limited the ability of the licensees to fulfill their responsibilities to the public. There are those who assert that the disputed clauses not only constitute a restraint upon free competition but also limit the ability of licensees to fulfill their responsibilities to the public as required by the law. Others contend that the legal effect of the contracts as well as actual practice indicates that licensees have not been prevented from fulfilling their duties under their licenses. We think that the record of these proceedings amply supports the latter view.

In entering into affiliation contracts licensees have placed certain voluntary restrictions upon themselves. However, the contracts provide that the station may cancel any program which in the judgment of the licensee is contrary to public interest or may substitute local programs of outstanding interest. In an extreme case, a licensee may be confronted with the choice between violation of the terms of his contract or the failure to carry some particular program or event which he knows his listeners want to hear. However, these cases are isolated and rare and do not appear to afford a proper basis to adopt a sweeping policy which might impair the cohesiveness of the national network organizations. In these circumstances the advantages should be weighed against the disadvantages before any attempt is made to disturb these contractual arrangements. It seems clear from this record that the benefits of the type of network organizations which have developed far outweigh any abuses which have been shown.

If this type of contract is essential to the maintenance of sound network operation—and the great weight of the evidence is to that effect—no attempt should be made to change them.

It is not necessary or desirable to prohibit options of a station's time. The record does not reveal that the operation of the option clauses have restricted the affiliates in their obligations to their local communities.

In fact, affiliation connections and time options appear essential because they facilitate better radio service to the public. Also, they appear necessary for effective coordination of program service on a national scale, because without them the situation would be analogous to a railroad in which each station-master along a *through route* had adequate power to make his own train schedules for through trains.

There is another aspect of network affiliation contracts which must be considered from the stations' point of view. The affiliated stations through their contractual arrangements with the networks have something which is in the nature of a valuable franchise. Networks, because of the exclusive arrangements with stations, have the incentive to develop good programs and to build up the affiliate stations as an institution in the community. Likewise, the station under its contract publicizes the programs of the network and identifies itself as the exclusive outlet for the particular network. The record shows that this arrangement has resulted in real competition among networks to win the listeners' interest. Such a competitive situation is definitely in the public interest. The result is that the affiliate station operating under an exclusive contract has greater value to adver-

tisers, both local and national. The experience of independent network stations definitely proves that a network contract is a valuable asset, both in terms of public service and in financial return to the station. The record in these proceedings indicates that the overwhelming majority of the affiliate stations recognizes that their existing network contracts constitute a most valuable franchise. The overwhelming majority of these stations does not want these arrangements disturbed. Through their testimony and by counsel, they have stated that they would prefer to maintain an individual bargaining position with the networks without intervention by this Commission into their business arrangements. This is as it should be, and measured in terms of public service—which should be the Commission's only concern—these contracts have met the test.

(6) In any consideration of the problems involved in chain broadcasting, one should not overlook the fact that the public should have a wide choice of programs. If all the stations in the country habitually broadcast identical programs, the service rendered would be limited. If the best interests of the public are to be served, no two stations rendering primary service to substantially the same area should habitually broadcast identical programs. Furthermore, more than one station in any community continuously rendering identical program service is a waste of radio facilities. It is not deemed necessary for the Commission to issue a regulation prohibiting duplication of a program in the same primary service area. Economic laws take care of such situations automatically and the practice is not sufficiently prevalent to justify any attempt to adopt a general regulation.

(7) Some criticisms of broadcasting are erroneously attributed to the fact that most of the licensees are business men. It is claimed that as such, their judgment as to social philosophies is similar. Thus, as a group they are said to reject social and economic philosophies advocated in recent years by some of our more "advanced thinkers". Therefore, it is claimed that the broadcasting licensees as a group are rendering to the people of the United States the character of broadcasting which tends to favor one social philosophy as contrasted to all others and that as a result the existing broadcasting service is not useful in accomplishing desired social improvements. The indisputed facts are that radio broadcasting has been utilized as an open forum. Furthermore, under the American system, the objective has been to render to the public the radio service the public desires rather than to force upon the public the type of service which individuals think the public should have.

Experience does not justify the conclusion that the limited number of available frequencies should be apportioned to groups of men or to separate organizations who are proponents of particular social philosophies. In fact, such a course might well destroy the general usefulness of radio. It would result in a trend toward the use of radio for a particularized purpose rather than its use in the public interest generally.

Under the American system of broadcasting the licensees are required to exercise independent judgment with respect to the operation of their stations. If this judgment is such as to render to the public the service the public desires, there can be no valid criticism. On the other hand, if a licensee does not render to the public the type of service

it desires, the qualifications of such a licensee to operate a broadcasting station should be open to question. We think that the Congress directed the Commission to require that no broadcasting station shall be operated for a single private interest. If there is doubt as to what Congress intended, it should be asked to clarify or specifically affirm this policy. Every broadcasting station should be operated solely in the interest of the entire public and no licensee should operate his station in a manner which reflects only one school of thought in controversial political, social, and economic matters of vital interest to the public. We think that, on the whole, broadcasters recognize this policy and adhere to it. It has found expression in the industry's voluntary code and is fulfilled in most important aspects.

(C) LICENSING POLICY

(1) It can be argued that all forms of unregulated monopoly are inherently contrary to public interest, and that to protect the public it is essential to regulate all monopolies. There can be no logical objection to such a doctrine when it is designed to restrain the exercise of unbridled power by private enterprise operating in the field of the public domain. In broadcasting Congress has provided for such regulation through the control of the issuance of licenses by the Federal Communications Commission. Therefore, any concentration of control in radio broadcasting which is contrary to public interest can be curbed by applying the licensing policy specified by Congress. The present Act implies that competition in broadcasting should be fostered through the application of a licensing policy designed to prevent a single individual from operating a preponderance of stations in a community or in the nation. If the licensing policy should permit one person to operate several stations within a community or to control the operation of too many stations in the nation, it is possible that a single person might be able to prevent the use of radio by persons other than those approved by the licensee. Such a course would be contrary to the spirit not only of the Act but also contrary to the best use of radio under the American system.

There are several instances of common ownership of several stations in a single community. However, no one has complained officially to the Commission of any abuses arising from such common control and there is no evidence in the files of the Commission or in the record of the hearing which indicates the necessity of promulgating a rule to correct such an imagined "evil". Nevertheless in some of these instances the operation of more than one station in the same community by a single licensee may raise a question of whether such concentration of control is in the public interest. In other cases such a situation may be in the public interest. The simplest and fairest way to solve the matter is for the Commission to adopt a policy, by regulation or otherwise, not to license more than one station in the same community to a single person, unless such person can show that such multiple operation is in the public interest. If such a course of action be adopted, a hearing should be held on the reasonableness of the proposed rule. At the same time the applications for renewal of all existing licenses which are not in conformity with the proposed

rule should be set for hearing. If as a result of these hearings, it is found that the continuance of the existing licenses of some of the licensees would not be in the public interest, the Commission should afford such licensees a reasonable time, say at least two years, in which to dispose of their stations.

(2) In connection with the problem of broadcasting control, it has been alleged that chain companies which operate networks utilize a large portion of the radio stations of the nation for the distribution of their programs. This question is raised with added fervor because such chain companies have the exclusive and optional clauses in contracts with their affiliates to assure control of the time of stations. Thus, it has been argued that such a chain company has the power to prevent the use of radio by persons other than those who can successfully negotiate with the chain company for time on a network. This question is one of the most difficult and controversial matters confronting the Commission.

As a remedy for this alleged evil, it has been proposed that program production agencies which engage in the business of providing programs to regularly established networks be prohibited from obtaining a license for the operation of any radio station.

It is essential that such an administration of the licensing power be analyzed thoroughly before adoption in order that we may be assured that the "cure" is not more vicious than the alleged evil. Every broadcast station licensee is a program production agency. A chain company is merely a program production agency equipped with land lines, and organized for efficient program distribution to the radio stations in the nation. Such efficiency of organization is essential and desirable if the public is to receive the best service. Therefore, there can be no valid objection to such organization, particularly when the service rendered is as acceptable to the public as it has been in the past. If the licensing of stations to such organizations will augment the efficiency of program distribution, there can be no valid objection to granting radio station licenses to such companies. Therefore, it would appear undesirable in the public interest to refuse on the basis of a general policy such companies licenses for any radio broadcasting stations. If a licensing policy is adopted which limits the number of stations licensed to chain companies in such manner as to insure competition and diversification of judgment, public interest would be served quite adequately. It is difficult to see why, in the interest of efficiency and cohesiveness in the distribution of programs on a national scale, there is any valid objection to licensing chain companies to operate at least one radio station in each of the larger metropolitan cities of the nation.

A more difficult question is raised by the operation of two network systems by a single company. The Commission might make the finding that two stations in a single community which obtain network service from the same source do not perform a proper public service. However, this would require evidence in a particular case in which the type of service rendered by each station was carefully analyzed and a record on these issues specifically developed. There is no evidence in this proceeding on the failure of stations affiliated with the company operating two networks to meet the test of public

interest. Nevertheless, the common ownership of dual networks raises questions of unreasonable restraint of competition. Therefore thorough-going inquiry is necessary to determine the legal effect of such dual operation in terms of monopolistic practices or restraint of trade. Such an inquiry is obviously under the exclusive jurisdiction of the Department of Justice which has the duty to prosecute matters pertaining to monopoly and restraint of trade. The Commission can request the Department of Justice to initiate an inquiry to determine the real facts. Or, if the Commission desires a determination of the proper public policy on this question, it could request Congress to make an appropriate declaration. However, before either of these steps is taken it is believed that there is available a more practical and immediate approach. This problem seems to be one which lends itself to an effort by all parties concerned to seek a solution by voluntary agreement.

In the solution of this problem one should not overlook the fact that operation of dual national networks provides an excellent "safety valve" in the present broadcast organization. There is readily available at all times an efficient nation-wide organization of radio facilities for discussion of important public questions. This "safety valve" should not be abandoned until a satisfactory substitute has been provided. Therefore, before taking any final steps it appears essential that all networks assume an even greater obligation to make their facilities available as a forum for discussion of public questions, as well as for sustaining programs of outstanding interest.

Undoubtedly there is a strong presumption that four highly competitive independently operated national networks would result in improved service to the public. However, as a corollary to this result it is essential that no single network be assigned an inequitable share of the duty to provide the service which makes radio broadcasting most useful in aiding the development of the political, social and economic welfare of the nation.

Therefore, precautions must be taken by the industry itself to avoid such inequalities or else the advantages to be gained by the elimination of dual operation of networks will be lost. It is doubtful, as has been stated, that the Commission through its licensing power or its rule-making power has the authority to accomplish the divestiture of one of the dual network systems. However, if it be determined finally that the disadvantages of dual operation of networks outweigh the advantages, and if a satisfactory substitute has been provided, the company which has developed the two networks it now operates should be given every opportunity to voluntarily adjust its operations to the end that the problem of common ownership of dual networks is eliminated. Failing this, the Commission should refer the entire matter to Congress.

(3) It has been suggested that any program production agency, particularly chain companies, should be compelled to obtain a Federal license to engage in such a business. There are numerous agencies which organize talent and in a sense produce programs to be utilized by the various radio stations. It is a simple matter to lease wires from a program production center to various broadcast stations distributed throughout a region or the nation. Such wires

can be leased for either a short or a long period. Some of these program production agencies may be organized on a large scale while others may be organized on a small scale. In any event, if the Government should adopt the policy of licensing program production agencies, the Government would be confronted at all times with a significant question. This question is inevitably whether the proposed program content will or will not be in the public interest. This is censorship. Furthermore, it would give to the licensing agency of the Government a power never contemplated in the statute or in its administration to date. It would constitute a power of Government to control what was said and who should speak. It would be control of the news obtained by the press and intended for distribution to the public by radio. Such a power concentrated in a licensing agency of the Government is dangerous in a democracy and would inevitably lead to a further curtailment of freedom of expression. This violates the Constitution of the United States. There is no reason why basic principles of democracy should be abandoned merely because radio is a modern instrumentality with inherent limitations in its application to the public service. Thus it is obvious that the advantages alleged to accrue from the licensing of program production agencies are outweighed overwhelmingly by the one disadvantage just discussed.

In view of the foregoing, the Government should neither prevent program production agencies from obtaining licenses to operate radio broadcast stations, nor should the Government compel program production agencies to secure a Federal radio license to engage in such a business. There is nothing before the Commission to justify such a course.

(D) ECONOMIC STABILITY

(1) Wide variations of prosperity exist between the various elements of the broadcasting industry. While some of this is caused by natural economic laws, and by differences in markets, the necessary inequality between the various classes of stations as well as differences imposed by nature within each class are also important factors affecting earning capacity.

(2) The business of broadcasting is essentially a service business. It has no tangible commodity of a permanent character. It has merely a temporary license to use frequencies which are essential to the operation of its equipment. Not only must each broadcaster maintain the public confidence and interest in the service rendered, but also the licensee must operate on a rigid basis of regulation by the Federal Government. In addition, the industry is confronted with swift change, rapid obsolescence and speedy and new demands upon the enterprise, initiative and capital of its members. There is always present the threat of sweeping changes in the technical base on which the radio stands, as for example, such developments as television and frequency modulation. In time of economic recession in the nation the business of broadcasting is affected immediately by cancellations of contracts for services. Thus, there is a potential risk ever present in the business of broadcasting, and a necessity for adequate financing at all times.

(3) These conditions constitute an economic situation which influence directly the broadcaster's capability to render a public service. Naturally, the Commission should be just as much concerned with the economic situation as it is with encouraging progress toward desired social objectives. However, it should recognize that its authority is not absolute and that it is not charged with the responsibility of directing the economic activities of its licensees. There is the positive duty to make certain that Commission policies do not detract from the economic stability of the industry, but there is no justification for the adoption of radical measures which would revolutionize the entire economic foundation without any certain knowledge that real improvements can be obtained.

An important contribution which the Commission can make to the stability of broadcasting is by an extension of the licensing period. The Commission now has the power to extend the period up to three years and there is no valid reason why this should not be done forthwith. Such a policy would result in an important administrative economy by reducing the great volume of needless and periodic reviews by the Commission staff of a mass of information which is accumulated and filed for no real public purpose. Such an extension of the licensing period would in no way limit the Commission's power to proceed by revocation against licensees who contravene public interest in the operation of their stations, and would create a helpful atmosphere of security.

Finally, it has been implied that there is something harmful or wicked about the earnings of some broadcasting licensees. Congress did not intend this Commission to penalize profits. Congress does now and will continue to tax the earnings of all broadcasters, as an examination of the financial statements of any of the leading companies in the field will show. If there be undue or unjust enrichment, the Federal tax policy is the remedy; not an extension of regulation.

III. SUMMARY OF SUPPORTING FACTS

(A) GENERAL

The Report of the Committee appointed to recommend Proposed Rules Governing Standard Broadcast Stations and Standards of Good Engineering Practice, (Docket 5072–A) outlines the physical aspects of the existing radio broadcast structure. In brief, this report disclosed that there was a concentration of the best radio facilities in the larger metropolitan districts of the nation and that the listeners in the less sparse areas of population obtained radio service principally from the larger stations located in the large centers of population. One of the recommendations of this Committee was as follows:

> In granting applications for improvements of facilities, the Committee recommends that the Commission adhere in general to the following order of priority:
> (1) Communities having no radio stations and capable of supporting same.
> (2) Communities having existing stations with inadequate technical facilities to serve properly the population therein.
> (3) Communities having an adequate number of radio stations and capable of supporting additions without detriment to resultant service.
> (4) Existing stations at a competitive disadvantage with other stations in the community by reason of inadequate technical facilities.
>
> In connection with the problem of distribution and improvement of broadcasting facilities the evidence is clear that for the purpose of allocation, each of the 96 metropolitan districts of the nation should be considered a single community. The economic interdependence of the various incorporated cities, towns, and villages in such a metropolitan district, the overlapping service areas of broadcasting stations located in such districts, and the general scarcity of broadcasting facilities available for distribution to the nation as a whole are compelling factors contributing to the impracticability of attempting to assign separate broadcasting facilities to each of the individual communities within each metropolitan district.
>
> The Committee, therefore, recommends that when considering the distribution of broadcasting facilities to all communities in the nation, the Commission classify as a single entity each of the 96 metropolitan districts described by the Bureau of Census.

The Report on Social and Economic Data Pursuant to the Informal Hearing on Broadcasting, Docket 4063, beginning October 5, 1936, submitted by the Engineering Department of the Commission on July 1, 1937, outlined in considerable detail the social and economic factors affecting the operation of the broadcasting structure at that time. The evidence developed since that date, and particularly in Docket 5060, relating to the Investigation of Chain Broadcasting pursuant to Order No. 37, contains no information of an economic character which indicates that the evidence obtained previously is erroneous in any respect.

The basic pertinent facts as disclosed in the hearing on Chain Broadcasting, Docket 5060, may be summarized in brief as follows:

(B) ORGANIZATION OF BROADCASTING FACILITIES

In the United States in 1938 there were 660 radio broadcast stations which operated on a commercial basis. These stations rendered program service to the various communities, States, and rural areas of

the nation. 350 of the stations were organized in 4 major networks for program distribution on a national scale. These national networks transmitted to the radio listeners of the country programs originating not only in various parts of the United States but also in the most important centers of the world.

Three of these networks of stations were vitalized by a central organization known as a chain company which undertook to produce programs and secure advertising revenue for the networks as a whole. Each of these chain companies had a centralized program production organization which coordinated the distribution of programs originating in the various parts of the nation. In addition, each of the chain companies had a sales organization which made contact with advertisers and advertising agencies and arranged for sponsors of the various programs. Some of the programs were produced by sponsors. Other programs, particularly those of the sustaining type, were organized and produced by the chain company, or in the event of news or political broadcasts, were "covered" by the chain company also. Some programs were produced by individual stations of the network and distributed to the entire network. The other major network was organized similarly to the three just mentioned, except that the production of programs was undertaken principally by the stations in the network.

There were 3 national chain companies, namely, the Columbia Broadcasting System, the National Broadcasting Company, which had 2 national networks, and the Mutual Broadcasting System. Columbia and National had contracts with their affiliates which bound the latter as outlets, and bound them to retain on option a definite amount of time. Until more recently Mutual operated on a voluntary "mutual" basis and permitted its outlets to take programs from other chain companies, as well as providing liberally for "time" to be retained by the affiliates. The other principal difference between Columbia and National on the one hand and Mutual on the other is that Columbia and National are separate corporate entities owning stations and contract with affiliates for exchange of services at an agreed price. Mutual is owned by several station licensees and makes affiliation contracts with other stations. Mutual in its headquarters sales-agency capacity usually takes a commission of 3.5% from members and 15% from affiliates for business it secures for the System. Any station, a part of Mutual, may secure business for the System on a commission basis.

There were 310 stations which were not affiliated with any national network. Some of these 310 stations were affiliated with regional networks, but in some instances these stations were in such locations as to preclude affiliation with a major national network without duplication of programs in the same area to the public. Also, some of these 310 stations were located in remote sections of the country or in sparsely settled communities where the cost of network program service was greater than the revenues secured from advertisers desiring to use the station as an outlet. Therefore, in 1938 these 310 stations relied solely upon local resources or upon transcriptions or upon regional networks for the production of programs. However, since that date some of them have become affiliated with a national network.

In addition to the 4 major national networks there were several regional networks in 1938, which were organized to transmit programs

originating in any part of a particiular region or particular section of the country, depending upon the number of stations comprising such a network.

The 660 stations were classified in accordance with the rules of the Federal Communications Commission. This classification is necessary in order that, in so far as is practicable within the requirements of good engineering practice, there may be a fair, efficient, and equitable distribution of facilities to the various states and communities of the nation, and at the same time permitting the rendition of good service to all the listeners wherever located in the nation.

In 1938 the distribution of the 660 stations by classes and by size of community is indicated in Table 1 A attached hereto. This table shows that there were 31 full time 50 kw clear channel stations, 4 limited time 50 kw clear channel stations, 14 full time clear channel stations having a power less than 50 kw, and 4 stations of the same class having only limited time. There were 8 high power regional stations, all of which had full time. These 61 clear channel and high power regional stations render service over wide areas and are the type of stations relied upon for service to rural listeners.

There were 296 regional stations utilized primarily for rendering program service to cities and areas immediately adjacent thereto. Of these 296, 195 were full time stations, 68 were limited time or day stations, and 33 were part time stations which shared their frequency assignment with one or more stations. There were 303 local stations intended to be utilized primarily for rendering service to small and medium sized cities or towns. Of these 303, 227 were full time and 76 were part time stations.

The distribution of the class of stations to the various size of cities was as follows:

City population	Total number of stations	Clear channel	High power regional	Regional	Local
2,000,000 or over	83	17	0	47	19
1,000,000 to 2,000,000	27	5	0	17	5
500,000 to 1,000,000	40	3	4	22	11
250,000 to 500,000	85	13	0	52	20
100,000 to 250,000	94	9	4	48	32
50,000 to 100,000	50	3	0	26	21
25,000 to 50,000	89	2	0	30	57
Less than 25,000	192	1	0	54	137
Total	660	53	8	296	303

It is significant to note that 329, approximately one half of the total stations in the country were located in the 96 metropolitan districts of the nation. Of the remaining 331 stations, 215 were of the local classification, 110 were of the regional class and 6 were clear channel stations.

(C) THE ECONOMICS OF BROADCASTING.

Broadcasting stations are supported primarily by advertisers desiring to utilize these media as a means of promoting the sale of commodities or services to the public.

Each broadcaster, whether the licensee of a large station or of a small one, each network and each program production agency, re-

ceives compensation in proportion to the value of the services rendered by each such organization. This value is affected directly by the degree to which the broadcast licensee, the network, or the program production agency satisfies the public. In other words, the greater the public interest in the radio service being rendered, the greater the value of radio to all concerned. Thus, the closer radio broadcasting service attains the objective of satisfying the public, the greater the rewards to the members, both large and small, of the industry. This is as it should be. Any attempt to circumvent this basic economic law, by Government fiat or otherwise, is certain to result in economic instability with its inevitable adverse effects upon sound American business enterprise as well as upon good program service to the public.

Advertisers are interested in "circulation" within a market. The "circulation" obtained by any radio station is dependent upon the number of listeners in the area covered by the station. The number of listeners depends upon the character of the program service rendered by the station, the licensed power of the station, its hours of operation and the number of competitive stations in the same market area.

Good markets are of primary interest to an advertiser because in an area where the purchasing power is large, the advertiser may reasonably expect a fair return on the monies expended for advertising, provided of course the public becomes interested in the product being distributed. On the other hand, if the purchasing power of the public in any given market is insufficient to justify the cost of advertising, the manufacturer or the wholesaler or the retailer may not desire to expend advertising funds in such a poor market.

Thus the revenue and income of the broadcast industry as well as units thereof are affected by—

(1) character of program service,
(2) type of facility,
(3) type of market in which a station is located,
(4) competition from other stations in the same market; and by
(5) management.

To date, stations which are located away from the centers of talent have been successful in stimulating public interest in the program content broadcast from their stations by being affiliated with a network. This affiliation enables a station to broadcast programs produced in the best talent centers and by the best talent in every section of the country and permits the dissemination of news of important events, not only in this country but also abroad. A station which is not affiliated with a network and not located favorably with respect to talent and market is handicapped in producing a program service which can sustain public interest.

Generally speaking, those stations which operated at a profit in 1938 were in a favorable position with relation to the factors just enumerated. On the other hand, those stations which operated at a loss had one of the following factors unfavorable to them:

(1) Circulation.
(2) Intense competition.
(3) Management.

In many instances the lack of favorable circumstances in the foregoing three factors was augmented by lack of network affiliation, inadequate facilities as to power and hours of operation, or by extraordinary expenses or utilization of "profits" in the form of salaries.

This outline of the economics of broadcasting is based upon an accumulation of data which has been condensed in the Tables attached hereto. Inasmuch as these Tables represent a compilation of data secured from a series of far more complex Tables, it is difficult to brief further the data without sacrificing adequate representation of all the factors which must be considered. It is, therefore, recommended that the Tables which are attached hereto be studied in order that full appreciation may be had of the significance of all the economic factors involved and in order that independent conclusions may be reached.

The locations of the different classes of stations operating at a profit or loss in the different types of markets are indicated in Table I B attached hereto. It should be noted that the poorer the class of station the greater chance of losing in any market. Also, the poorer the market the greater the chance of operating at a loss. The greatest percentage of losers were the local stations. While there were a greater number of local stations than any other single class, the chances of operating at a loss were greater in local stations than in any other class. Likewise, the chances of operating at a loss were greater when a station was licensed only for part time. Generally speaking, network stations had greater revenues than stations not affiliated with any major network, and consequently the chances of losing were less for network stations. These factors are illustrated by the following Table, which shows the percentage of losers by classes of stations.

Percent of stations of each class operating at loss in 1938	Classes of stations
7.5	Clear channel and high power regional, unlimited time.
12	Clear channel, part time.
26	Regional, unlimited time.
42.6	Regional, day and unlimited time.
45.4	Regional, part time.
45.3	Local, unlimited time.
48.7	Local, part time.
36.8	All stations.
26.5	Network stations.
47.5	Nonnetwork stations.

In general, the broadcast revenues of the various stations decreased as the value of the market in which the station was located decreased. Revenue of stations having good facilities was greater than those with less favorable facilities.

These facts are illustrated by the curves given in Tables II, III, IV and IV–B.

The average revenue and income under the various conditions for 660 stations in 1938 is illustrated in Tables V, V–B, VI and VII. These show that 420 stations operated at a profit and 240 stations operated at a loss in 1938. Of these 660 stations, 350 were affiliated

with one of the major networks and 310 were not affiliated with any major network. Of the 350 network stations, 92 operated at a loss. Of the 310 non-network stations, 148 operated at a loss. Most of the stations affiliated with networks operating at a loss were located either in a poor market or in a good market in which there was intense competition. Some of the other stations operating at a loss had poor facilities, such as only part time or low power. Eighty-two of the stations operating at a loss were located in cities of less than 25,000 population, 54 in cities from 25,000 to 100,000, 57 in cities from 100,000 to 500,000 and 47 in cities of over 500,000 population.

The distribution of broadcast revenue and income to the various classes of stations and to the chain companies is indicated in Tables VIII, IX, X, and XI. The distribution of the dollar revenue and income is indicated in Tables XII and XIII.

From these tables it is obvious that the vast volume of revenue went to the chain companies and the 350 stations on the networks. Three hundred and ten stations not affiliated with any network had 12.7 per cent of the total volume of revenue. The three major chain companies and the stations licensed to them had 40.1 per cent of the total revenue, distributed as follows: 16.5 per cent to Columbia, 23.1 per cent to National and 0.1 per cent to Mutual. The stations affiliated with but not licensed to the chain companies obtained 46.7 per cent of the revenue. Four regional networks obtained 0.5 per cent of the revenue.

The ratio of net income to net time sales in 1938 for selected typical stations in various classes of markets and for the chain companies, is given herewith.

Organization or class of station	Ratio of net income to net time sales (per cent)	Approximate 1930 population of Metropolitan District in which station is located
Columbia Broadcasting System	21.2	(1)
National Broadcasting Company	15.2	(1)
Mutual Broadcasting System		(2)
50-kilowatt clear channel station	23.9	161,000
Do	32.3	2,100,000
1-kilowatt regional with network affiliation	13.8	379,000
Do	11.5	181,000
Do	.2	495,008
Do	5.8	2,850,000
1-kilowatt regional with no network affiliation	1.2	2,300,000
Do	6.5	2,300,000
Do	15.9	2,850,000
Do	3.4	10,900,000
Local station with network affiliation	3.3	119,000
Do	3.4	155,000
Do	15.3	19,000
Do	7.8	118,000
Do	10.8	425,000
Do	10.4	52,000
Do	5.0	820,000
Do	18	332,000
Do	32.4	399,000
Do	21.7	1,900,000

[1] Nation-wide network.
[2] Operating losses made up by members.

Organization or class of station	Ratio of net income to net time sales (per cent)	Approximate 1931 population of Metropolitan District in which station is located
Local station with no network affiliation	0.04	608,000
Do	2.7	16,000
Do	19.1	860
Do	19.7	1,290,000
Do	.9	371,000
Do	3.2	949,000
Do	10.4	2,850,000
Do	8.3	21,400
Do	10.4	4,365,000
Do	7.9	14,300

The amount of net income and the percentages for the chain companies and the groups of stations are as follows:

Organization or class of station	Net income	Ratio of net income to net time sales (per cent)
Columbia Broadcasting System	$3,541,739	[1] 21.2
National Broadcasting Company	3,434,301	[1] 15.2
2 clear channel stations	505,162	28.8
4 regional stations affiliated with networks	35,780	7.4
4 regional stations not affiliated with networks	68,632	6.9
10 local stations affiliated with networks	106,625	14.0
10 local stations not affiliated with networks	46,449	7.5

[1] The relationship to total revenue, which includes net time sales and incidental revenues, is 19.2 per cent and 13.3 per cent, respectively.

IV. CONCLUSIONS

There are certain factors which should provide the basis for nsideration of the many complex problems in the field of radio oadcasting. However, as has been stated elsewhere in this report, abrupt changes should be attempted without positive indication at such changes will result in improved service to the public. The cord in this instant investigation does not justify sweeping pro-sals to change the developments resulting from practical experience. It must be considered that since 1927, the American system of oadcasting has developed under a Congressional formula which, til recently, has been administered in its broad policy aspects with ir consistency by the Commission and, on the whole, uniformly erpreted by the Courts.

It must be admitted that imperfections exist. No human institu-n is free from error. It is significant, however, that this record ils to disclose important abuses. Moreover, no information is ailable to the Commission which justifies an invasion of the siness practices of the licensees of this Commission.

It is true that some of the pioneers in broadcasting have achieved nspicuous financial success. Likewise others who have made con-butions to the industry and the public have been well rewarded. is fact alone affords no proper basis for a radical extension of regulatory scheme.

The record shows that in broadcasting there exists vigorous com-ition in the areas that count. It is the duty of the Commission preserve and encourage such competition. However, we should embark upon novel or untried courses of regulation based upon re speculation as to how American businessmen should manage ir affairs. Rather we should consider that the consequences of r acts might injure or retard further improvement in the existing tem and the service which it now performs.

Competition accompanied by good radio service to the public should ntinue to be fostered by the Commission. However, the blind herence to the slogan "free competition," regardless of all prac-al factors, is unsound and will result in a conglomeration of un-rdinated radio stations rendering an inferior service to the public. On the whole, radio broadcasting has an excellent record of pub-service. This includes both networks and the independent sta-. Possibly with a few isolated exceptions, radio has been scrupu-sly fair in dealing with questions of political, social and economic portance. It has been progressive and enterprising in the enter-ment field. The public has been and should continue to be its t important and only censor.

adio is so constituted that it is sensitive to public criticism and onds promptly to changing public tastes. For this Commission ny agency of Government to attempt to substitute its judgment that of the public involves an arrogant presumption which should voided at all costs. That such a policy is not contemplated by ne on the Commission seems quite clear. However, it can be

argued with logic that invasion of this economic field by the licensing authority in the absence of clear legal mandate, would constitute an inevitable prelude to the second step of assuming the role of arbiter of public tastes.

Circumstances may require the Federal government to exercise broad powers in many fields of our economic life; but it is imperative that broadcasting be maintained as a free American institution. To adopt some pattern of government regulation as applied in other fields is to ignore the real nature of broadcasting. Borrowed techniques just don't fit. Broadcasting must be kept free from unnecessary Government restraints. Nowhere has this concept been given better expression than in a recent statement of the President of the United States wherein he said:

> Your Government has no wish to interfere or hinder the continued development of the American system of broadcasting. Radio was born and developed in the real American way and its future must continue on that basis.

Our views in this matter may be summarized as follows:

1. The Commission is without jurisdiction to promulgate regulations which undertake to control indirectly the business arrangements of broadcasting licensees.

2. The record shows vigorous competition among networks and independent stations within the limitations of facilities imposed by nature and thus no finding of illegal monopoly can be made by this Commission, even if it can be assumed that this Commission had the legal authority to make such determination.

3. The Commission through its licensing powers has ample authority to deal with any abuses that may arise, or which may now exist. Thus with the possible exception of clarification of the procedural and appellate provisions of the Communications Act of 1934, no legislative changes seem necessary.

4. There is no support in the record of these proceedings or otherwise in the possession of the Commission which would require new regulations which would attempt to control the relations between networks and affiliates.

5 Broadcasting service is essentially a national service. It must be recognized that listeners prefer good programs originating from any source where there is superior talent and which may have greater entertainment value than would otherwise be available from a purely local source.

6. There is an important function to be served by the smaller local stations. The Commission should continuously strive to improve the technical efficiency of such stations and, within the limits of the Act, afford encouragement to broader economic opportunities for such stations. This should not be attempted by the destruction or impairment of existing services. There is room for both.

7. There is the strong presumption that four competing national networks independently operated might afford opportunity for improved service, although there is nothing in this record to establish that stations affiliated with the company operating two networks have not rendered a good public service. It is, therefore, recommended that informal discussions begin forthwith between the Commission and the representatives of the company operating two networks with a view of obtaining a voluntary segregation.

8. Network companies maintain concert and artist managment bureaus as an incident to their operations. The Commission has no jurisdiction in this field. However, the companies should be notified that the Commission intends to request an inquiry by either the Federal Trade Commission or the Department of Justice, or both, in the event the companies do not divest themselves of these activities within a reasonable time.

9. There is no reason why the Commission should not forthwith extend the terms of broadcast licenses to the full statutory limit of three years. This would create an atmosphere of greater stability in the industry and would in no way detract from the Commission's power to proceed by revocation against licensees who contravene the standard of public interest.

Finally, it seems appropriate to emphasize that our government is concerned with many important and crucial problems. This is no time to embark upon a new and untried course for which no urgent need can be established. It seems to us that the kind of democratic freedom which we are preparing to defend requires those in government to manifest restraint and tolerance. There is no evidence to justify an attempt at unnecessary controls of the broadcasting industry under even normal circumstances. In this atmosphere of world tension, our own national unity would be disserved by a new experiment at "reform" of an established system of mass communication upon which so many of our people rely for information and diversion.

313425—41——10

TABLE 1-A

660 STANDARD BROADCAST STATIONS GROUPED ACCORDING TO POPULATION OF COMMUNITY IN WHICH LOCATED, NETWORK OR NONNETWORK SERVICE, CLASS AND TIME DESIGNATION, AND WHETHER OPERATED AT PROFIT OR LOSS. (1938)

LESS THAN 25,000 Population		25,000 TO 50,000 Population		50,000 TO 100,000 Population		100,000 TO 250,000 Population		250,000 TO 500,000 Population		500,000 TO 1,000,000 Population		1,000,000 TO 2,000,000 Population		MORE THAN 2,000,000 Population		TOTALS		
NETWORK	NONNET.	NETWORK	NONNET.	NETWORK	NONNET.	NETWORK	NONNET.	NETWORK	NONNET.	NETWORK	NONNET.	NETWORK	NONNET.	NETWORK	NONNET.	NETWORK	NONNET.	ALL
				1		3		8		2		4		12		30		30
														1		1		1
						1		1						2		4		4
		2		2		2		3		1				1		11		11
								1				1		1		3		3
1						2										3		3
						1										1		1
						4				4						8		8
11	7	15		14		28		31	1	16		6	3	6	6	127	17	144
4	4	5	3	4		9	1	5		2	1	1	3	4	5	34	17	51
2	11	1	4	1	5		1	1	2	2			2			7	32	39
	10		2	1		2	2	1	4			1			6	5	24	29
	1			1		4		1		1		1			9	8	10	18
3	1						1	4	2						4	7	8	15
17	37	10	14	8	2	12	8	5	2	3	4	1	2		4	56	68	124
9	37	8	13	6	4	7	5	3	2	1	2		2	1	3	35	68	103
2	21	1	4			1	2		4						4	4	35	39
4	10	1	4		1	1	2		4		1				7	6	31	37
33	77	29	22	27	7	57	6	50	9	29	4	12	7	21	30	358	162	420
20	62	14	24	11	5	20	11	14	12	3	4	3	5	7	25	92	148	240
53	139	43	46	38	12	77	17	64	21	32	8	15	12	28	55	350	310	660
192		89		50		94		85		40		27		83				

CLASS OF STATION
CC 50 KW, FT
CC 50 KW, PT
CC 5 to 25 KW FT
CC 5 to 25 KW PT
HP REG.
FT. REG.
LT REG.
PT REG.
LOCAL FT
LOCAL PT
TOTAL
GRAND TOTAL

TABLE 1-B

660 STANDARD BROADCAST STATIONS GROUPED ACCORDING TO RELATIVE IMPORTANCE OF MARKET AREA IN WHICH LOCATED, NETWORK OR NONNETWORK SERVICE, CLASS AND TIME DESIGNATION, AND WHETHER OPERATED AT PROFIT OR LOSS. (1938)

AREA I			AREA II			AREA III			AREA IV			TOTAL		
NETWORK	NONNET.	ALL	NETWORK	NONNET.	ALL	NETWORK	NONNET.	ALL	NETWORK	NONNET.	ALL	NETWORK	NONNET.	ALL
23		23	7		7							30		30
1		1										1		1
3		3	1		1							4		4
6		6	4		4	1		1				11		11
3		3										3		3
			2		2				1		1	3		3
			1		1							1		1
4		4	4		4							8		8
50	10	60	59	2	61	16	2	18	2	3	5	127	17	144
11	9	20	15	1	16	5	5	10	3	2	5	34	17	51
2	13	15	4	10	14		5	5	1	4	5	7	32	39
1	7	8	4	6	10		7	7		4	4	5	24	29
1	9	10	6	1	7				1		1	8	10	18
2	4	6	3	3	6				2	1	3	7	8	15
3	12	15	28	13	41	18	20	38	7	23	30	56	68	124
2	8	10	19	18	37	9	28	37	5	14	19	35	68	103
	8	8	2	8	10		9	9	2	10	12	4	35	39
	12	12	1	8	9	4	4	8	1	7	8	6	31	37
92	52	144	117	34	151	35	36	71	14	40	54	258	162	420
20	40	60	43	36	79	18	44	62	11	28	39	92	148	240
112	92	204	160	70	230	53	80	133	25	68	93	350	310	660

TABLE 1-C

SUMMARY

NETWORK	NONNET.	ALL
31		31
4		4
14		14
4		4
8		8
161	34	195
12	56	68
15	18	33
91	136	227
10	66	76
350	310	660

NOTE: Small upper figures in squares show number of stations having competition from 4 or more other stations in same community; small lower figures in squares show number having such competition with 4 major network outlets and hence could not obtain major network service without duplicating major network primary service area in whole or in part.

KEY TO CLASS OF STATION

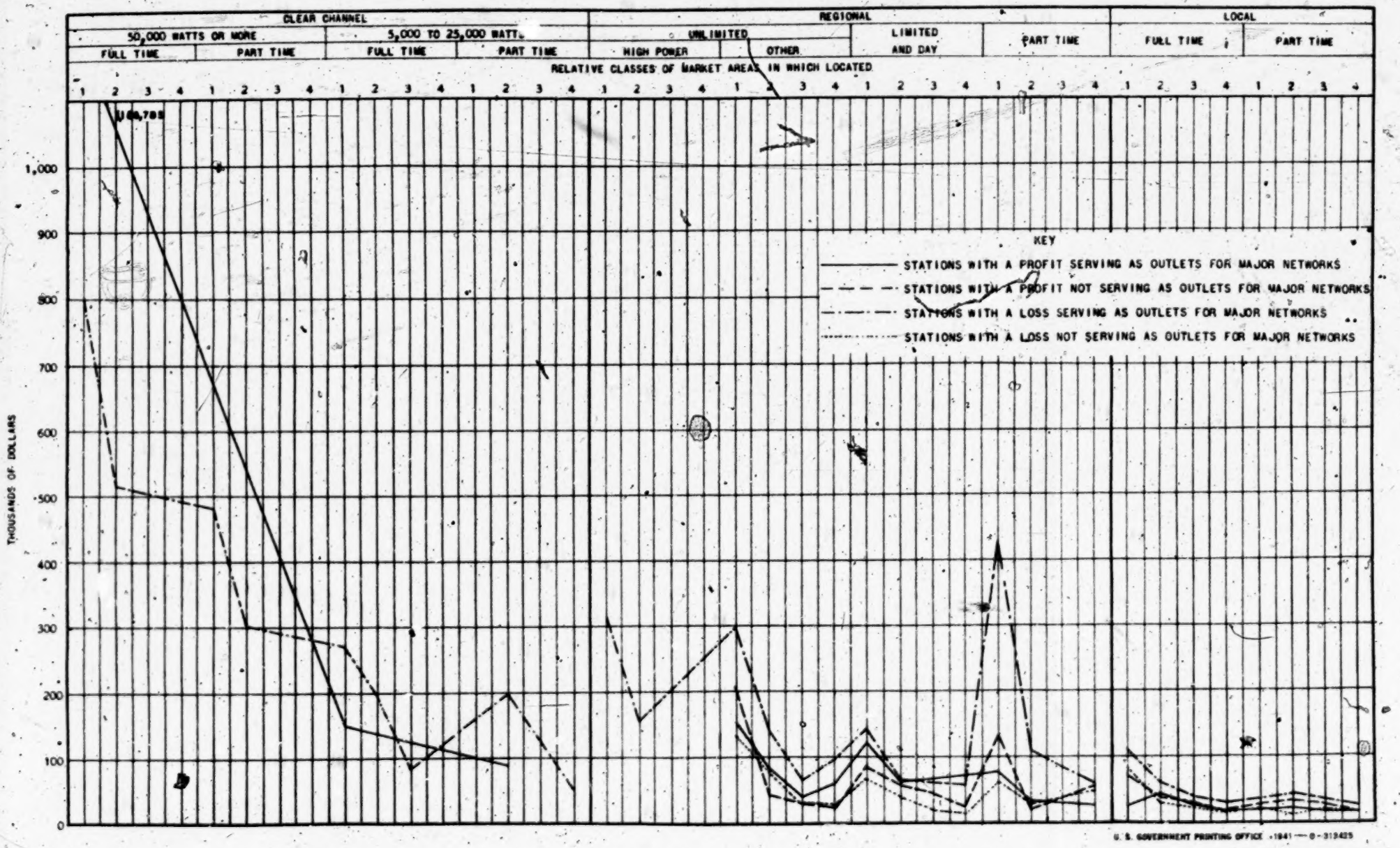
CC	Clear channel	REG	Regional
FT	Full time	HP	High power
LT	Limited time	PT	Part time

U. S. GOVERNMENT PRINTING OFFICE : 1941 — 0 - 313425

(Follows p. 139) No. 1

AVERAGE REVENUES COMPARED
660 STATIONS IN THE RELATIVE CLASSES OF MARKETS ACCORDING TO CLASSES OF STATIONS
1938

TABLE II

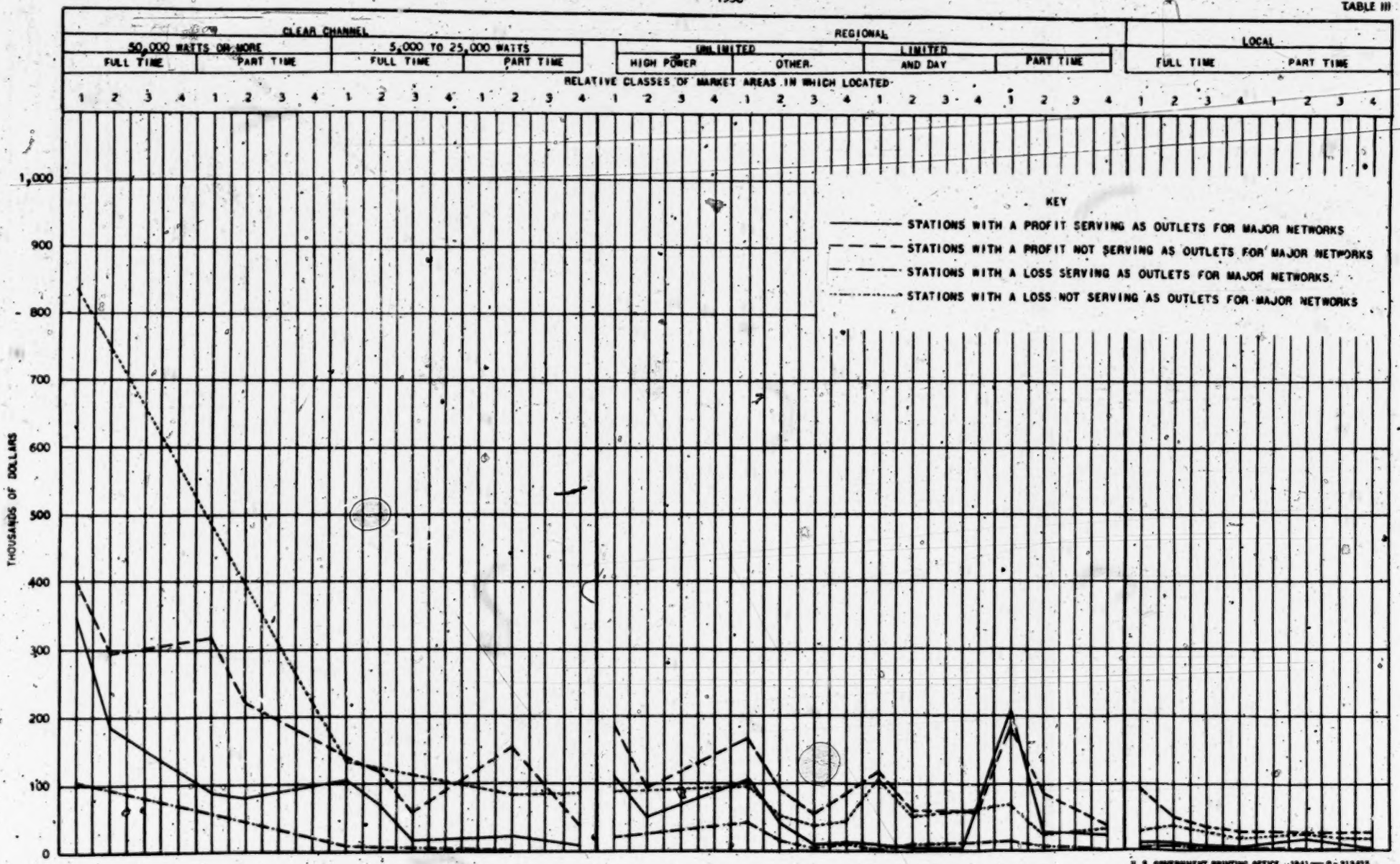


U. S. GOVERNMENT PRINTING OFFICE : 1941 — 0-312425

(Follows p. 139) No. 2

AVERAGE NETWORK AND NONNETWORK TIME SALES COMPARED
350 STATIONS SERVING MAJOR NETWORKS IN THE RELATIVE CLASSES OF MARKETS ACCORDING TO CLASSES OF STATIONS
1938

TABLE III

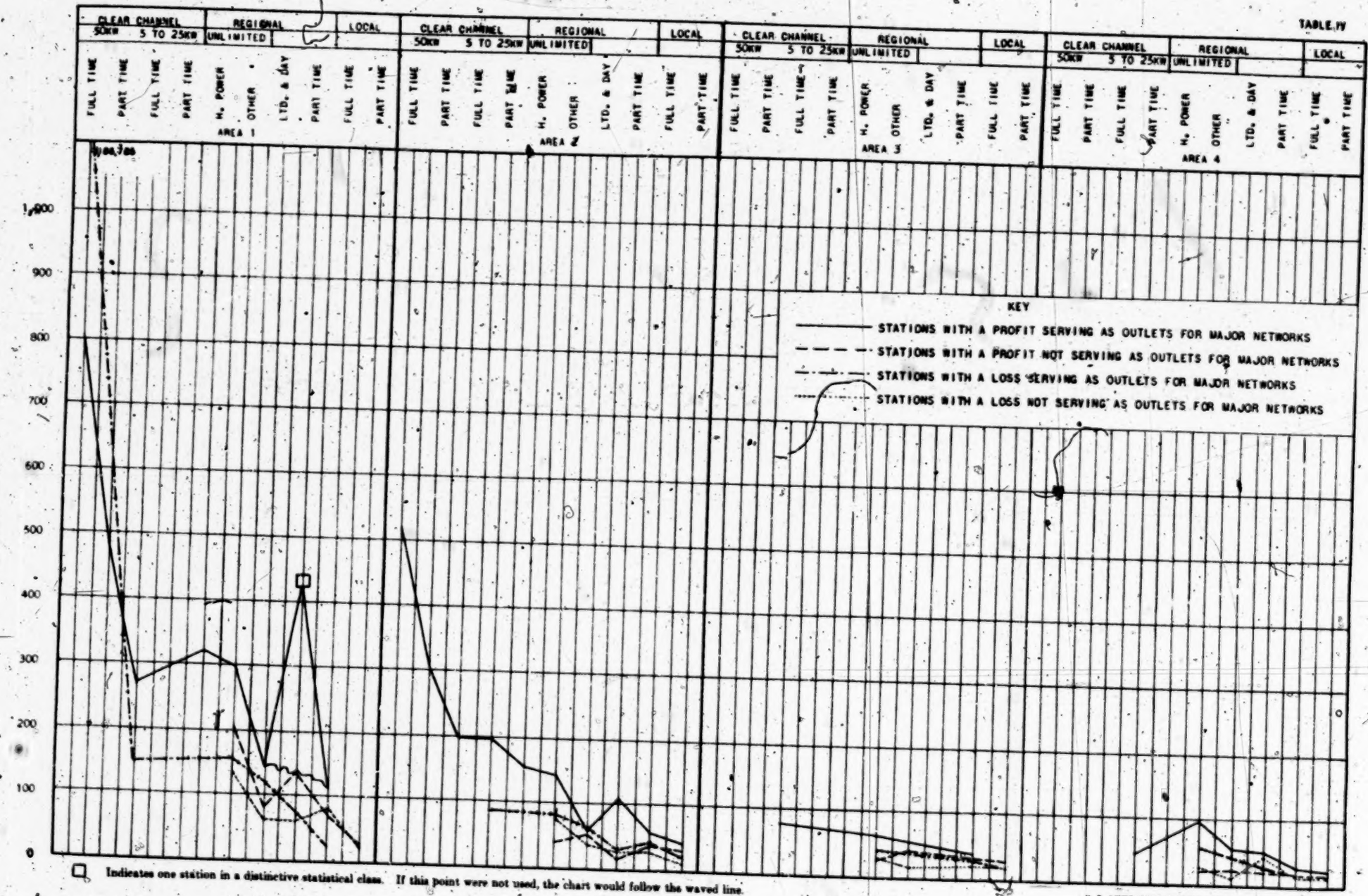


U. S. GOVERNMENT PRINTING OFFICE : 1941 — O - 313425

(Follows p. 139) No. 3

AVERAGE REVENUES COMPARED
660 STATIONS ACCORDING TO CLASSES OF STATIONS IN THE RELATIVE CLASSES OF MARKETS
1938

TABLE IV



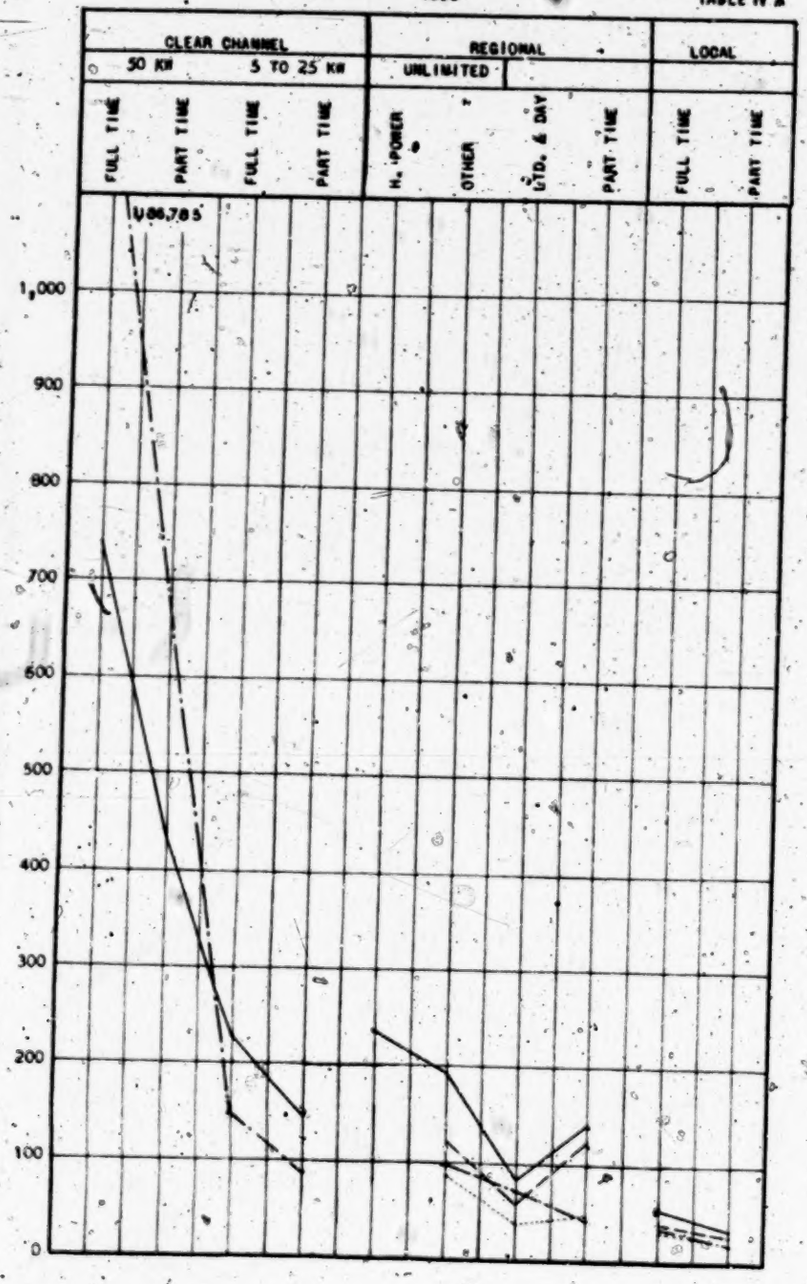
Indicates one station in a distinctive statistical class. If this point were not used, the chart would follow the waved line.

U. S. GOVERNMENT PRINTING OFFICE: 1941 — 0-313425

(Follows p. 139) No. 4

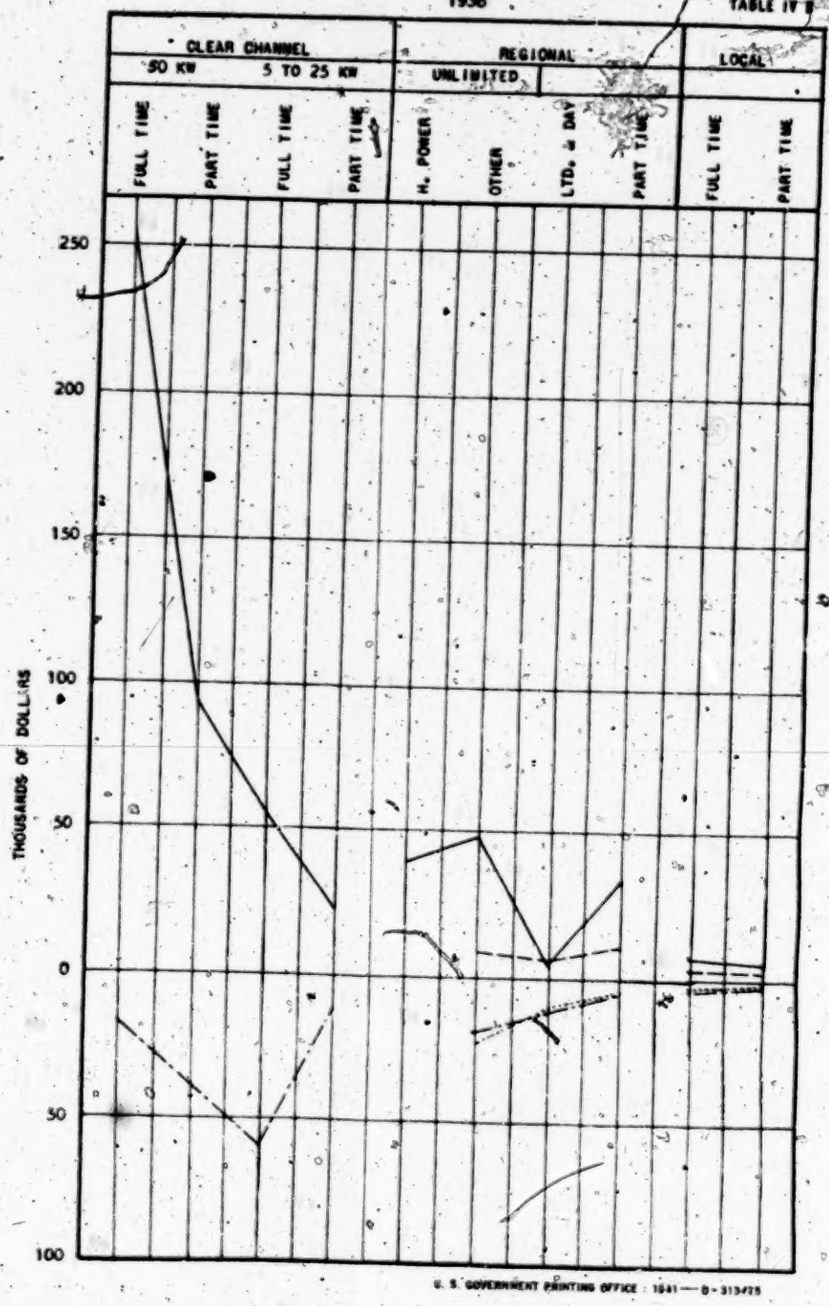
AVERAGE REVENUES COMPARED
660 STATIONS ACCORDING TO CLASSES OF STATIONS
1938

TABLE IV A



AVERAGE BROADCAST INCOME COMPARED
660 STATIONS ACCORDING TO CLASSES OF STATIONS
1938

TABLE IV B



KEY

——— STATIONS WITH A PROFIT SERVING AS OUTLETS FOR MAJOR NETWORKS

– – – STATIONS WITH A PROFIT NOT SERVING AS OUTLETS FOR MAJOR NETWORKS

—·—·— STATIONS WITH A LOSS SERVING AS OUTLETS FOR MAJOR NETWORKS

····· STATIONS WITH A LOSS NOT SERVING AS OUTLETS FOR MAJOR NETWORKS

U. S. GOVERNMENT PRINTING OFFICE : 1941 — 0 - 313475

(Follows p. 139) No. 5

TABLE V–A.—*Average revenues and average broadcast income, 660 stations according to major network service in the relative classes of market areas shown by class of stations according to profit or loss, 1938*

Class of station	Stations with a profit				Stations with a loss				Total stations in area			Stations with a profit				Stations with a loss				Total stations in area		
	Major network		No major network		Major network		No major network		Stations			Major network		No major network		Major network		No major network		Stations		
	Number stations	Average	Number stations	Average	Number stations	Average	Number stations	Average	Major network	No major network	Total	Number stations	Average	Number stations	Average	Number stations	Average	Number stations	Average	Major network	No major network	Total
Clear channel:																						
50,000 watts:																						
Unlimited	23	R $805,090 I 266,967			1	R $1,186,785 L 47,224			24		24	7	R $517,152 I 118,490							7		7
Part-time	3	R 481,538 I 81,164							3		3	1	R 304,358 I 140,602							1		1
5,000 to 25,000 watts:																						
Unlimited	6	R 271,576 I 83,175			3	R 149,865 L 60,976			9		9	4	R 195,850 I 27,972							4		4
Part-time												2	R 196,081 I 32,765			1	R $88,866 L 12,712			3		3
Regional:					Area I												Area II					
Unlimited:																						
High power	4	R 349,299 I 52,526							4		4	4	R 153,135 I 26,883							4		4
Other	50	R 288,936 I 79,797	10	R $206,986 I 14,913	11	R 153,863 L 39,092	9	R $134,520 L 34,724	61	19	80	59	R 140,769 I 30,680	2	R $42,150 I 2,792	15	R 83,942 L 12,183	1	R $76,911 L 1,223	74	3	77
Limited and day	2	R 140,267 I 1,179	13	R 80,402 I 9,781	1	R 120,453 L 25,595	7	R 66,103 L 19,456	3	20	23	4	R 61,729 I 8,825	10	R 54,999 I 6,993	4	R 59,819 L 9,767	6	R 38,254 L 11,932	8	16	24
Part-time	1	R 426,522 I 183,377	9	R 133,177 I 11,999	2	R 76,681 L 1,751	4	R 62,752 L 3,701	3	13	16	6	R 110,666 I 13,717	1	R 18,511 I 1,342	3	R 30,287 L 10,687	3	R 28,345 L 4,239	9	4	13
Local:																						
Unlimited	3	R 110,654 I 16,672	12	R 73,673 I 6,438	2	R 25,731 L 647	8	R 83,551 L 5,786	5	20	25	28	R 60,934 I 9,354	13	R 36,133 I 3,290	19	R 41,010 L 5,375	18	R 29,900 L 3,708	47	31	78
Day and part-time			8	R 28,053 I 4,483			12	R 23,376 L 4,780		20	20	2	R 42,293 I 10,059	8	R 31,643 I 3,223	1	R 23,122 L 9,544	8	R 12,847 L 3,829	3	16	19
Total	92	R 422,328 I 130,527	52	R 104,273 I 9,565	20	R 182,708 L 33,028	40	R 71,833 L 14,179	112	92	204	117	R 142,902 I 29,613	34	R 40,461 I 4,277	43	R 57,684 L 9,006	30	R 28,679 L 5,828	160	70	230

Total number of stations for the area in the respective categories				144						60							151						79								
Total with profit													92	52	144													117	34	151
Total with loss													20	40	60													43	36	79
Clear channel:																															
50,000 watts:																															
Unlimited																															
Part-time																															
5,000 to 25,000 watts:																															
Unlimited	1	R 79,438 I 5,076											1		1													2			
Part-time																1	R 48,176 I 1,109											1		1
							Area III																Area IV								
Regional:																															
Unlimited:																															
High power																															
Other	16	R 65,275 I 11,729		2	R 25,691 I 1,409		5	R 40,749 L 4,866		5	R 29,187 L 5,951		21	7	28	2	R 97,261 I 6,300		3	R 21,406 I 3,519		3	R 59,207 L 11,074		2	R 26,862 L 905		5	5	10
Limited and day				5	R 42,769 I 3,006					7	R 19,344 L 3,152			12	12	1	R 58,205 I 1,539		4	R 23,706 I 1,001					4	R 13,837 L 12,856		1	8	9
Part-time																1	R 56,474 I 11,007					2	R 28,244 L 2,159		1	R 45,189 L 16,786		3	1	4
Local:																															
Unlimited	18	R 38,574 I 6,600		20	R 31,943 I 4,725		9	R 28,790 L 4,006		28	R 21,485 L 3,855		27	48	75	7	R 29,125 I 2,728		23	R 19,978 I 2,499		5	R 16,769 L 6,825		14	R 16,755 L 3,154		12	37	49
Day and part-time				9	R 29,489 I 4,044		4	R 19,006 L 1,782		4	R 20,118 L 2,623		4	13	17	2	R 24,934 I 4,956		10	R 15,851 I 2,493		1	R 16,455 L 5,818		7	R 15,943 L 714		3	17	20
Total	35	R 51,948 I 8,901		36	R 32,541 I 4,131		18	R 30,038 L 3,751		44	R 21,896 L 3,869		53	80	133	14	R 43,652 I 3,947		40	R 19,425 I 2,424		11	R 30,401 L 7,208		28	R 17,878 L 4,256		25	68	93
Total number of stations for the area in the respective categories				71						62							54						39								
Total with profit													35	36	71													14	40	54
Total with loss													18	44	62													11	28	39

R = Average broadcast revenue.
I = Average broadcast income.
L = Average broadcast loss.

143

209

TABLE V B.—*Average broadcast revenues and average broadcast income 660 stations according to profit or loss, shown by classes of stations*

1938

Class of station	420 stations with a profit						240 stations with a loss						660 stations					
	Stations			Averages			Stations			Averages			Major network		No major network		All stations	
	Major network	No major network	Total	Major network	No major network	All stations	Major network	No major network	Total	Major network	No major network	Total	Number stations	Averages	Number stations	Averages	Number stations	Averages
Clear channel:																		
50,000 watts:																		
Unlimited	30		30	R $737,904 I 255,322		R$737,904 I 255,322	1		1	R $1,186,785 L 17,224		R $1,186,785 L 17,224	31	R$752,384 I 246,530			31	R$752,384 I 246,530
Part-time	4		4	R 437,243 I 96,024		R 437,243 I 96,024							4	R 437,243 I 96,024			4	R 437,243 I 96,024
5,000 to 25,000 watts:																		
Unlimited	11		11	R 226,572 I 56,001		R 226,572 I 56,001	3		3	R 149,865 L 60,976		R 149,865 L 60,976	14	R 210,135 I 30,935			14	R 210,135 I 30,935
Part-time	3		3	R 146,779 I 22,213		R 146,779 I 22,213	1		1	R 88,866 L 12,712		R 88,866 L 12,712	4	R 132,301 I 13,482			4	R 132,301 I 13,482
Regional:																		
Unlimited:																		
High power	8		8	R 236,217 I 39,704		R 236,217 I 39,704							8	R 236,217 I 39,704			8	R 236,217 I 39,704
Other	127	17	144	R 192,845 I 47,246	R$133,633 I 9,886	R 185,853 I 42,835	34	17	51	R 98,029 L 19,768	R $87,485 L 20,306	R 94,514 L 19,947	161	R 172,820 I 33,094	34	R $110,559 L 5,210	195	R 161,965 I 26,415
Limited and day	7	32	39	R 83,665 I 5,599	R 59,496 I 6,754	R 63,834 I 6,547	5	24	29	R 71,945 L 12,932	R 36,792 L 11,645	R 42,853 L 11,867	12	R 78,782 L 2,422	56	R 49,706 L 1,132	68	R 54,886 L 1,306
Part-time	8	10	18	R 143,374 I 34,586	R 121,710 I 10,933	R 131,339 I 21,446	7	8	15	R 42,959 L 5,697	R 47,654 L 5,538	R 45,463 L 5,612	15	R 96,513 I 15,787	18	R 88,796 I 3,613	33	R 92,304 I 9,146

Local:																												
Unlimited	56	68	124	R 52,434 I 8,033	R 36,061	I 4,000	R 43,455	I 5,821	35	68	103	R 33,531 L 4,960	R 30,043	L 3,899	R 31,228	L 4,259	91	R 45,164 I 3,036	136	R 33,052 I 51	227	R 37,907 I 1,347						
Day and part-time	4	35	39	R 33,613 I 7,508	R 25,757	I 3,513	R 26,562	I 3,923	6	31	37	R 19,866 L 3,748	R 18,560	L 3,338	R 18,723	L 3,405	10	R 25,185 I 754	66	R 22,376 I 295	76	R 22,746 I 356						
Total number of stations	258	162	420						92	148	240						350		310		660							
Group average				R 224,818 I 61,396	R 53,990	I 5,485	R 158,927	I 39,830				R 78,192 L 12,887	R 36,282	L 7,011	R 51,581	L 9,263		R 185,750 I 41,870		R 45,536 L 481		R 119,892 I 21,978						

R=Average broadcast revenue.
I=Average broadcast income.
L=Average broadcast loss.

TABLE VI.—*Average broadcast revenues and average broadcast income of 350 stations serving as outlets for major networks distributed by classes of stations according to profit and loss.*

1938

Particulars	Stations showing profit			Stations showing loss					
	Number stations	Average total broadcast revenues	Average broadcast income	Number stations	Average total broadcast revenues	Average broadcast income	Number stations	Total average total broadcast revenues	Average broadcast income
1	2	3	4	5	6	7	8	9	10
Area 1:									
Clear channel, unlimited, 50,000 watts or more	23	$805,000	$296,967	1	$1,186,785	(1)$17,224			
Clear channel, part-time, 50,000 watts or more	3	481,538	81,164	None					
Clear channel, unlimited, 5,000 to 25,000 watts	6	271,576	83,175	3	149,865	(1)60,976			
Clear channel, part-time, 5,000 to 25,000 watts	None			None					
Regional, unlimited, high power	4	319,299	52,526	None					
Regional, unlimited, other than high power	50	298,936	79,797	11	153,863	(1)39,092			
Regional, limited and day	2	140,267	1,179	1	120,453	(1)25,595			
Regional, part-time	1	426,522	183,377	2	76,681	(1)1,751			
Local, unlimited	3	110,854	16,672	2	25,731	(1)647			
Local, day and part-time	None			None					
Total	92	422,328	130,527	20	182,708	(1)33,028			
Area 2:									
Clear channel, unlimited, 50,000 watts or more	7	517,152	118,490	None					
Clear channel, part-time, 50,000 watts or more	1	304,358	140,602	None					
Clear channel, unlimited, 5,000 to 25,000 watts	4	195,850	27,972	None					
Clear channel, part-time, 5,000 to 25,000 watts	2	196,081	32,765	1	88,966	(1)12,712			
Regional, unlimited, high power	4	153,135	26,883	None					
Regional, unlimited, other than high power	59	140,789	30,680	15	83,942	(1)12,183			
Regional, limited and day	4	61,729	8,825	4	50,819	(1)9,767			
Regional, part-time	6	110,666	13,717	3	30,287	(1)10,687			
Local, unlimited	28	60,934	9,354	19	41,010	(1)5,375			
Local, day and part-time	2	42,293	10,059	1	23,122	(1)9,544			
Total	117	142,902	29,613	43	67,684	(1)9,006			
Area 3:									
Clear channel, unlimited, 50,000 watts or more	None			None					
Clear channel, part-time, 50,000 watts or more	None			None					
Clear channel, unlimited, 5,000 to 25,000 watts	1	79,438	5,076	None					
Clear channel, part-time, 5,000 to 25,000 watts	None			None					
Regional, unlimited, high power	None			None					
Regional, unlimited, other than high power	16	65,275	11,729	5	40,749	(1)4,866			
Regional, limited and day	None			None					
Regional, part-time	None			None					
Local, unlimited	18	38,574	6,600	9	28,720	(1)4,006			
Local, day and part-time	None			4	19,455	(1)1,782			
Total	35	51,948	8,901	18	30,038	(1)3,751			

(1) Represents loss

TABLE VI.—*Average broadcast revenues and average broadcast income of 350 stations serving as outlets for major networks distributed by classes of stations according to profit and loss*—Continued.

1938

Particulars	Stations showing profit			Stations showing loss			Number stations	Total average total broadcast revenues	Average broadcast income
	Number stations	Average total broadcast revenues	Average broadcast income	Number stations	Average total broadcast revenues	Average broadcast income			
1	2	3	4	5	6	7	8	9	10
Area 4:									
Clear channel, unlimited, 50,000 watts or more	None			None					
Clear channel, part-time, 50,000 watts or more	None			None					
Clear channel, unlimited, 5,000 to 25,000 watts	None			None					
Clear channel, part-time, 5,000 to 25,000 watts	1	48,176	1,109	None					
Regional, unlimited, high power	None			None					
Regional, unlimited, other than high power	2	97,261	6,300	3	59,207	(1) 11,674			
Regional, limited and day	1	58,205	1,539	None					
Regional, part-time	1	56,474	11,007	2	28,244	(1) 2,159			
Local, unlimited	7	29,125	2,728	5	16,769	(1) 6,825			
Local, day and part-time	2	24,934	4,956	1	16,455	(1) 5,818			
Total	14	43,652	3,947	11	30,401	(1) 7,208			
Summary:									
Clear channel, unlimited 50,000 watts or more	30	737,905	255,322	1	1,186,785	(1) 17,224	31	$732,384	$246,530
Clear channel, part-time, 50,000 watts or more	4	437,243	96,024	None			4	437,243	96,024
Clear channel, unlimited, 5,000 to 25,000 watts	11	226,572	56,001	3	149,865	(1) 60,976	14	210,135	30,935
Clear channel, part-time, 5,000 to 25,000 watts	3	146,779	22,213	1	88,866	(1) 12,712	4	132,301	13,482
Regional, unlimited, high power	8	236,217	39,704	None			8	236,217	39,704
Regional, unlimited, other than high power	127	192,843	47,246	34	95,029	(1) 19,768	161	172,820	33,094
Regional, limited and day	7	83,665	5,599	5	71,945	(1) 12,932	12	78,782	(1) 2,122
Regional, part-time	8	143,374	24,586	7	42,959	(1) 5,697	15	96,513	15,787
Local, unlimited	56	52,434	8,033	35	33,531	(1) 4,960	91	45,164	3,036
Local, day and part-time	4	33,613	7,508	6	19,566	(1) 3,748	10	25,185	754
Total	258	224,818	61,306	92	76,192	(1) 12,887	350	185,730	41,870

(1) Represents loss.

TABLE VII.—*Average broadcast revenues and average broadcast income of 310 stations not serving as outlets for major networks distributed by classes of stations according to profit and loss*

1938

Particulars	Stations showing profit			Stations showing loss			Number stations	Total average total broadcast revenues	Average broadcast income
	Number stations	Average total broadcast revenues	Average broadcast income	Number stations	Average total broadcast revenues	Average broadcast income			
1	2	3	4	5	6	7	8	9	10
Area 1:									
Regional, unlimited, other than high power	10	$206,986	$14,913	2	$134,520	(1)$34,724			
Regional, limited and day	13	80,402	9,781	7	66,103	(1)19,459			
Regional, part-time	9	133,177	11,999	4	62,752	(1) 3,701			
Local, unlimited	12	73,673	6,438	8	83,551	(1) 5,786			
Local, day and part-time	8	28,053	4,483	12	23,376	(1) 4,780			
Total	52	104,273	9,565	40	71,833	(1) 14,179			
Area 2:									
Regional, unlimited, other than high power	2	42,150	2,792	1	7[illegible],911	(1) 1,223			
Regional, limited and day	10	54,999	6,933	6	38,254	(1) 11,632			
Regional part-time	1	18,511	1,342	3	28,345	(1) 4,239			
Local, unlimited	13	36,133	3,290	18	29,900	(1) 3,708			
Local, day and part-time	8	31,643	3,223	8	12,847	(1) 3,829			
Total	34	40,461	4,277	36	28,679	(1) 5,028			
Area 3:									
Regional, unlimited, other than high power	2	26,691	1,400	5	29,187	(1) 5,951			
Regional, limited and day	5	42,769	3,006	7	19,344	(1) 3,152			
Regional, part-time									
Local, unlimited	20	31,943	4,725	28	21,483	(1)3,8[illegible]			
Local, day and part-time	9	29,489	4,044	4	20,118	(1) 2,62[illegible]			
Total	36	32,541	4,131	44	21,896	(1) 3,869			
Area 4:									
Regional, unlimited, other than high power	3	21,406	3,519	2	26,862	(1) 905			
Regional, limited and day	4	23,706	1,001	4	13,837	(1) 12,8[illegible]			
Regional, part-time				1	45,189	(1) 16,7[illegible]			
Local, unlimited	23	19,978	2,499	14	16,765	(1) 3,[illegible]54			
Local, day and part-time	10	15,851	2,493	7	15,949	(1) 714			
Total	40	19,426	2,424	28	17,878	(1) 4,256			
Summary:									
Regional, unlimited, other than high power	17	133,633	9,886	17	87,485	(1)20,306	34	$110,559	(1)$5,210
Regional, limited and day	32	59,496	6,754	24	36,792	(1) 11,645	56	49,766	(1) 1,132
Regional, part-time	10	121,710	10,933	8	47,654	(1) 5,538	18	88,796	3,613
Local, unlimited	68	36,061	4,000	68	30,043	(1) 3,899	136	33,052	51
Local, day and part-time	35	25,757	3,513	31	18,560	(1) 3,338	66	22,376	295
Total	162	53,900	5,485	148	36,282	(1) 7,011	310	45,536	(1) 481

(1) Represents loss.

TABLE VIII.—*Broadcast revenue and income in relation to major network service*

1938

Item	Network system station group	Number stations	Broadcast revenue	Broadcast income	
				Amount	Ratio to net time sales (per cent)
1	2	3	4	5	6
1	Columbia Broadcasting System, Inc., and stations serving it exclusively. (See Table IX)	104	$33,198,850	$7,410,976	24.1
2	National Broadcasting Company, Inc., and stations serving it exclusively. (See Table IX)	116	42,518,060	8,072,737	21.2
3	Mutual Broadcasting System, Inc., and stations serving it exclusively. (See Table IX)	19	5,475,298	385,405	7.0
4	Stations serving 2 or more networks, including 1 major network or more. (See Table IX)	111	16,050,047	3,134,773	21.6
5	Total for major network systems	350	97,242,255	19,003,891	21.7
6	Stations not serving any major network (including 305 which served no network)	310	14,116,123	[4] 149,107	.....
7	Four regional networks [1]	.....	549,513	67,569	[4] 5
8	Total for the industry	660	111,907,891	18,922,353	16.7

[1] Not included in FCC published tabulations for 1938 (Release No. 34737-1).
[4] Represents loss.

TABLE IX.—*Broadcast revenue and income Major network Systems*

1938

Item	Major network system	Number stations	Broadcast revenue	Broadcast income	
				Amount	Ratio to net time sales (per cent)
1	2	3	4	5	6
1	(a) Columbia Broadcasting System, Inc., and Stations licensed to it	9	$18,472,198	$4,303,249	25.8
	(b) Stations serving CBS exclusively	95	14,726,652	3,107,727	22.2
2	(a) National Broadcasting Company, Inc., and stations licensed to it	10	23,405,735	3,548,489	17.5
	(b) Stations licensed to others but operated for NBC	5	2,466,951	537,436	23.8
	(c) Stations serving NBC exclusively	101	16,645,374	3,986,812	25.7
3	(a) Mutual Broadcasting System, Inc. (No Stations licensed to or operated for it)	.....	100,486	30,383	30.2
	(b) Stations serving MBS exclusively	19	[1] 4,880,461	355,022	8.5
4	(a) Stations serving CBS and other networks	10	1,361,767	434,170	10.4
	(b) Stations serving NBC and other networks	46	11,459,443	2,893,234	28.6
	(c) Stations serving MBS and other networks	55	3,228,837	107,369	3.5

[1] Does not include $494,351 contributed by members in liquidation of operating deficits.

TABLE X.—*Relative financial results of operation major network systems and other groups*

1938

Item	Network system or station group	Number stations	Broadcast revenue		Broadcast income	
			Amount	Ratio to industry total %	Amount	Ratio to industry total %
1	2	3	4	5	6	7
1	(a) Columbia Broadcasting System, Inc. and stations licensed to it	9	$18,472,198	16.4	$4,303,249	22.50
	(b) Stations serving CBS exclusively	93	14,726,652	13.2	3,107,727	16.30
	(c) Received from CBS by 10 stations serving CBS and 1 other network or more		329,022	0.3	[1] 64,490	0.34
	(d) Total CBS system business		33,527,872	29.9	7,475,376	39.14
2	(a) National Broadcasting Company, Incorporated and stations licensed to it	10	23,405,735	20.9	3,548,489	18.60
	(b) Stations licensed to others but operated for NBC	5	2,466,951	2.2	537,436	2.81
	(c) Stations serving NBC exclusively	101	16,645,374	14.8	3,986,812	21.06
	(d) Received from NBC by 46 stations serving NBC and 1 other network or more		3,537,393	3.2	[1] 688,600	3.61
	(e) Total NBC system business		46,055,453	41.1	8,761,337	46.02
3	(a) Mutual Broadcasting System, Inc. (no stations licensed to or operated for it) [2]		[3] 594,837	0.6	30,383	0.18
	(b) Stations serving MBS exclusively	19	4,880,461	4.3	355,022	1.85
	(c) Received from MBS by 55 stations serving MBS and 1 other network or more		550,356	0.5	[1] 107,000	0.65
	(d) Total MBS system business		6,025,854	5.4	492,405	2.48
4	Stations serving 1 major network or more and also 1 other network or more, excluding amounts received from major networks, showing business derived from their own efforts	111	11,633,076	10.4	[1] 2,274,773	12.00
5	Four regional networks [3]		549,513	0.5	67,569	0.36
6	Stations not serving any major network (including 305 which served no network)	310	14,116,123	12.7	[4] 149,107	
7	Total for the industry	660	111,907,891	100.0	18,922,353	100.00

[1] Apportioned in the ratio which major network revenue bears to total revenue, the remainder being allocated to the non-major network business of the 111 stations.
[2] Includes $404,351 which was not revenue from the operating point of view, since it represented contributions by members in liquidation of operating deficits.
[3] Not included in FCC published tabulations for 1938 (Release No. 34737-1).
[4] Represents loss.

TABLE XI.—*Relative financial results of operation, separately for station and network operations*

1938

Item	Station group or network	Number stations	Broadcast revenue	Broadcast income	
				Amount	Ratio to net time sales (per cent)
1	2	3	4	5	6
1	Stations showing profit:				
	(a) Serving as outlets for major networks	258	$38,002,968	$15,840,040	27.2
	(b) Not serving as outlets for major networks (including 161 which served no network)	162	8,746,374	888,493	10.1
	(c) Total showing profit	420	66,749,342	16,728,533	25.0
2	Stations showing loss:				
	(a) Serving as outlets for major networks	92	7,009,669	[2] 1,185,595	
	(b) Not serving as outlets for major networks (including 144 which served no network)	148	5,369,749	[2] 1,037,600	
	(c) Total showing loss	240	12,379,418	[2] 2,223,195	
3	Total station operation	660	79,128,760	14,505,338	18.3
4	Network operation:				
	(a) Columbia Broadcasting System		12,812,587	2,541,721	20.0
	(b) National Broadcasting Company		18,822,194	1,777,342	9.5
	(c) Mutual Broadcasting System		[1] 594,837	30,353	5.1
	(d) Four regional networks		549,513	67,569	12.3
	(e) Total network operation		32,779,131	4,417,015	13.6
5	Total for the industry	660	111,907,891	18,922,353	16.9

[1] Includes $494,351 which was not revenue from the operating point of view, since it represented contributions by members in liquidation of operating deficits.
[2] Represents loss.

TABLE XII.—*Relative distribution of revenue and income dollar separately for station and network operation*

Item	Station group or network	Number stations	Broadcast revenue dollar	Broadcast income dollar	
				Distribution	Ratio to industry total (percent)
1	2	3	4	5	6
1	Stations showing profit:				
	(a) Serving as outlets for major networks	258	51.8	83.7	74.
	(b) Not serving as outlets for major networks (including 161 which served no network)	162	7.8	4.7	
	(c) Total showing profit	420	59.6	88.4	79.
2	Stations showing loss:				
	(a) Serving as outlets for major networks	92	6.3	(1) 6.3	
	(b) Not serving as outlets for major networks (including 144 which served no network)	148	4.7	(1) 5.5	
	(c) Total showing loss	240	11.0	(1) 11.8	
3	Total station operation	660	70.6	76.6	
4	Network operation:				
	(a) Columbia Broadcasting System		11.60	13.50	12.00
	(b) National Broadcasting Company		16.80	9.40	8.54
	(c) Mutual Broadcasting System		.52	.15	.14
	(d) 4 regional networks		.48	.35	.32
	(e) Total network operation		29.40	23.40	21.00
5	Total for the industry	660	100.00	100.00	100.00

(1) Represents loss.

TABLE XIII.—*Condensed summary of broadcast income of selected networks and groups of stations, 1938*

Item	Particulars	Number stations	Net time sales	Per cent of total	Total broadcast revenues	Per cent of total	Broadcast expenses	Per cent of total	Broadcast income	Percent of total	Ratio of net income to net time sales (per cent) [1]
1	2	3	4	5	6	7	8	9	10	11	12
1	Columbia Broadcasting System, Inc.	9	[2] $16,689,393	16.5	$18,472,198	16.4	$14,168,949	15.2	$4,303,249	22.7	21.2
2	Mutual Broadcasting System, Inc.	None	100,486	.1	594,837	.5	564,454	.6	[3] 30,383	.2	0
3	National Broadcasting Company, Inc.	[4] 15	[2] 22,582,049	22.3	25,872,686	23.1	21,786,761	23.5	4,085,925	20.8	15.2
4	Regional network companies	15	3,272,200	3.2	3,794,058	3.4	3,333,670	3.6	460,388	2.4	(See 8)
5	Stations serving as outlets for NBC only	101	15,553,539	15.3	16,645,374	14.9	12,658,562	13.6	3,986,812	21.1	14.1
6	Stations serving as outlets for CBS only	95	14,006,896	13.8	14,726,652	13.2	11,618,928	12.5	3,107,727	16.4	18.3
7	Stations serving as outlets for Mutual only	19	4,177,729	4.1	4,880,461	4.4	4,525,439	4.9	355,022	1.9	8.3
8	Stations serving as outlets for more than one network (other than those shown on Line 4 above)	96	11,750,987	11.6	12,805,502	11.4	10,063,548	10.8	2,741,954	14.5	9.8
9	Stations serving as outlets for regional networks only	5	417,445	.4	623,781	.6	765,562	.8	[3] 141,781		(Loss)
10	Stations not serving as outlets for any network	365	12,842,413	12.7	13,492,342	12.1	13,499,668	14.5	[3] 7,326		(Loss)
11	Total		101,393,137	100.0	111,907,891	100.0	92,985,538	100.0	18,922,353	100.0	

[1] Based on representative samples for the itemized category if the category includes more than 1 licensee or company. The term refers to income available for dividends.

[2] While serving exclusively as outlets for CBS and NBC, some of the stations showed revenue from regional networks. This actually was revenue from sales of station time to stations in "hook-ups" such as Texas Quality Network, which is not a regional network, but the revenue of the stations in the "hook-up" is from regional chain or network service.

[3] Shown as profit but actually represent excess of contributions over expenses.

[4] Includes $888,178 net expense of operating these stations incurred by their licensees, namely, General Electric Company and Westinghouse Electric and Manufacturing Company.

[5] Represents loss.

U. S. GOVERNMENT PRINTING OFFICE: 1941

[fol. 224] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Upon the annexed verified Complaint and upon the Affidavits of William S. Paley and Herbert V. Akerberg, the plaintiff moves the Court as follows:

1. To convene for the purpose of hearing and determining this application and this cause, a statutory court of three judges at least one of whom shall be a circuit judge, in accordance with the provisions of Section 402 (a) of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C. § 402 (a)) and of the Urgent Deficiencies Appropriation Act (38 Stat. 219, 220; 28 U. S. C. § 47 (1913)).

2. To issue a temporary restraining order suspending and restraining the operation, enforcement, or execution of that portion of the order of the Federal Communications Commission dated May 2, 1941 (as amended by the order of October 11, 1941) which is specified in Paragraph Seventh of the Complaint in the above entitled action, pending the hearing upon the issuance of the temporary injunc-
[fol. 225] tion sought hereinafter in this motion and the determination thereof.

3. To issue a temporary injunction suspending and restraining the operation, enforcement, or execution of that portion of the order of the Federal Communications Commission dated May 2, 1941 (as amended) which is specified in Paragraph Seventh of the Complaint in the above entitled action, pending the final hearing and determination of this cause.

The grounds of this motion, as more fully set forth in the annexed Complaint and in the annexed Affidavits of William S. Paley and Herbert V. Akerberg, are that:

a. The portions of the order of the Commission complained of are invalid.

b. The Commission, unless enjoined, threatens to enforce this order.

c. The order and its enforcement are causing and will cause immediate and irreparable injury to the plaintiff.

d. Unless the operation and enforcement of the order be restrained pending final disposition of the action, the injury to plaintiff in the interim will be irreparable even by final judgment for plaintiff.

e. No injury will be sustained by the defendant or by the public through issuance of a temporary injunction and restraining order.

Signed: John J. Burns, Attorney for Plaintiff, Business and P. O. Address: 40 Wall Street, New York, N. Y.

[fols. 226-229] NOTICE OF MOTION

To: The Federal Communications Commission
Washington, D. C.
The Attorney General of the United States
Washington, D. C.
The United States Attorney for the Southern District of New York, United States Court House, Foley Square, New York, N. Y.

Please take notice that the undersigned will bring the above motion on for hearing before this Court on the 7th day of November 1941, at 10:00 A. M., or as soon thereafter as counsel may be heard, at Room 506 in the United States Court House, Foley Square, New York, N. Y.

Signed: John J. Burns, Attorney for Plaintiff. Business and P. O. Address: 40 Wall Street, New York, N. Y.

Dated: October 31, 1941.

[fol. 230] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

against

THE UNITED STATES OF AMERICA, Defendant

AFFIDAVIT OF WILLIAM S. PALEY, PRESIDENT OF COLUMBIA BROADCASTING SYSTEM, INC.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

WILLIAM S. PALEY, being duly sworn, deposes and says:

1. Deponent. I am the President of Columbia Broadcasting System, Inc. (hereinafter sometimes called "CBS" or "Columbia") and I have been its President since September 26, 1928. I am fully familiar with its organization, history, and the nature of its operations, and with the history and nature of radio broadcasting and particularly of "chain" or "network" broadcasting. This affidavit is for the purpose of obtaining a temporary restraining order and temporary injunction against the enforcement of a portion of the Order of the Federal Communications Commission (hereinafter called the "Commission"), set forth in paragraph "Seventh" of the complaint herein.

[fol. 231] 2. The Plaintiff. Columbia Broadcasting System, Inc. is a corporation organized and existing under the laws of the State of New York, and is engaged in the business of network broadcasting. It has been engaged in this business continuously since January 27, 1927, when its predecessor, United Independent Broadcasters, Inc., was organized.

CBS has outstanding 1,716,277 shares of capital stock, listed and dealt in on the New York Stock Exchange and owned by over 8,000 stockholders. As appears from the balance sheet as of December 28, 1940, a copy of which is hereto annexed, marked Exhibit A, and made a part hereof, CBS has total assets in excess of $22,000,000, over $18,000,000 of which is devoted to network broadcasting, of

which $6,440,004.74 consists of fixed assets such as land, buildings and transmitters, and other physical assets.

In connection with the conduct of its network business, CBS operates, under license from the Commission, eight commercial broadcasting stations designated and known as WABC, New York; WJSV, Washington, D. C.; WBBM, Chicago; KMOX, St. Louis; WCCO, Minneapolis; KNX, Los Angeles; WBT, Charlotte, N. C.; and WEEI, Boston. All of these stations except WEEI, Boston, are owned by Columbia; WEEI is operated by Columbia as lessee of the property which is owned by the Boston Edison Company, Inc.

The business of network broadcasting consists of supplying programs to a number of broadcasting stations for simultaneous broadcasting. These programs are of two kinds, sustaining and commercial. Sustaining programs are programs containing no advertising which are furnished by the network to the stations at no direct cost. Commercial programs are those "sponsored" by an advertiser; for these programs the advertiser pays the network and the [fol. 232] network in turn pays the station broadcasting the programs. Stations thus served by the network are known as its affiliates. At present the CBS network includes 123 American stations, 115 of which are independently owned affiliates, seven of which are owned by CBS, one of which CBS leases and operates, and all of which are licensed by the Commission. CBS programs are available to over 90% of the nation's entire night-time radio audience.

The operations of a network and of the stations affiliated with it are closely related and mutually dependent. A description of these operations and their interrelation is necessary to an explanation of the effect of the Rules complained of on broadcasting.

3. Physical Characteristics of Broadcasting; Role of the Federal Communications Commission. Broadcasting is accomplished by the generation, at the broadcasting station, of modulated radio waves, forming a part of the electromagnetic spectrum, which travel to receiving instruments which amplify them and translate them into audible sound waves. Radio waves vary in length and frequency. Because these waves impinge upon each other, the number of frequencies available for broadcasting is limited.

The number of frequencies available for regular broadcasting (known as the standard broadcast band) is limited also because some frequencies must be kept out of the standard band and made available for other classes of broadcast service for which there is a public need, such as international broadcast, radio telephone and telegraph service, marine, police, aviation, facsimile, amateur, experimental and other services. Moreover, the number of standard stations which can effectively broadcast without mutual interference is limited.

[fol. 233] Because the unlimited and unregulated use of these limited facilities causes interference and confusion, and thereby prevents the public from receiving the full benefits of radio reception, Congress provided administrative machinery in the Commission, and its predecessor, the Federal Radio Commission, to apportion and license the use of these frequencies. The Commission is empowered to allocate frequencies to various classes of radio service, to license stations, to prescribe the physical type of the service to be rendered by them, and to designate their respective frequencies, power and hours of operation.

At the end of 1940 there were about 850 stations licensed by the Commission to operate as standard commercial broadcast stations, each on a designated wave length, with designated power, and for a designated time of the day.

4. Economics of Broadcasting; Need for National Networks. The American system of radio is based upon the use of the broadcasting stations for advertising purposes; i. e., the revenue of the station is derived from the broadcasting of programs on behalf of advertisers who pay for the use of the station's facilities. Advertising, as the basis for broadcasting service without cost to the listener, was not established by fiat. From among several methods of providing revenue to stations to enable them to operate and render a service to the public, the practice of selling radio time to advertisers developed as the best and most effective. The eventual success of this practice and the development of network broadcasting are the foundations of the commercial structure of radio broadcasting today.

Individual broadcast stations derive their income from commercially sponsored programs, either of network or of local origin. Network commercial programs are sponsored by advertisers whose products are widely distributed, com-

monly known as national advertisers. Local commercial [fol. 234] programs are of two distinct kinds: those sponsored by local advertisers and those sponsored by national advertisers. When a local program is sponsored by a national advertiser it is known in the radio industry as a national spot program. National spot programs always originate at the studio of the local station, and are performed there for broadcast either by live talent or, more usually, by mechanically reproducing a recorded program which is known as a transcription. National network programs, on the other hand, are performed by live talent.

In addition to commercially sponsored programs, individual stations also broadcast sustaining programs. Sustaining programs are those programs which are broadcast by the station without sponsorship by any advertiser. The sustaining programs are broadcast by the station in order that it may present a continuous series of programs, attract a larger listening audience, serve the public interest, and build the station's goodwill. The quality of sustaining programs can be improved by the individual station when its revenues from advertising increase. A prosperous station is able to build and broadcast better programs of local interest to its community.

The sale of the station's time and facilities to local advertisers is made by the sales force of the station. The sale of the station's time and facilities to national advertisers for national spot broadcasts is made by organizations known in the industry as station representatives. These representatives are generally located in the cities where national advertisers, or advertising agencies which place their advertising, have their offices. It is the custom and practice in the industry for the station to designate such a representative as its exclusive agent for the sale of the station's time and facilities for national spot advertising. The sale of the station's time to national advertisers [fol. 235] for network broadcasting is made by the network with which the station is affiliated by contract.

While of course broadcasting rates for both network and local programs are influenced by the popularity of its programs and competition with other media for advertisers, the charge of a station for its time varies with the station, and depends in large part upon its "coverage", or the size of its regular listening audience. Coverage by a station depends upon a variety of factors, such as the power and

frequency which it is authorized to use, the density of the population and ownership of radio sets within its coverage area, and the quality of its programs. Affiliation with a network or the lack of such affiliation substantially affects the quality of the station's programs.

Of the approximately 850 commercial standard broadcast stations operating in the United States, 495 were affiliated with one of the national networks at the end of 1940. In substance, this means that these stations looked to a network to supply them with programs, both commercial and sustaining, for a portion of their time; and also that they relied upon the network for the sale of a portion of their time.

Few stations in the country could themselves produce and offer the public the full program service which the American radio audience receives today. No station could have the aggregate of creative skills represented in a great network organization such as Columbia, or the economic resources, or the talent supplies. In the first place there is a concentration of performing talent in the metropolitan centers such as New York, Chicago and Los Angeles, and the available supply of talent outside such cities is insufficient to provide a continuous flow of varied program material. In the second place, individual stations are financially unable at their own expense, to plan, develop and offer [fol. 236] to their listening audiences expensive entertainment programs, cultural programs such as concerts of the New York Philharmonic Symphony Orchestra, educational programs such as The Columbia School of the Air, and world-wide on-the-spot news coverage of foreign and domestic events of national importance. In the third place, advertisers cannot and do not finance programs of such quality for broadcasting on single stations, since the potential audience of single stations, which to the advertiser spells potential sales, is not large enough to warrant such expenditures. The needs of the stations and the manifested desires and taste of the public led to the system of network broadcasting as a means of supplying these programs, and to the practice of affiliation by a station with a network as a means of obtaining these programs.

5. Network Broadcasting. CBS is one of the three organizations at present operating a nation-wide network system. The oldest network organization is National

Broadcasting Company, Inc. (hereinafter referred to as NBC), a wholly-owned subsidiary of Radio Corporation of America which was founded and began operating in 1926. It operates two network systems, known as the "Red" and the "Blue" networks, together having 214 affiliated stations at the end of 1940. The other network organization is Mutual Broadcasting System, Inc. (hereinafter referred to as Mutual), which was established in 1934 and which is largely controlled by the Chicago Tribune, a newspaper, and R. H. Macy and Company, a department store. At the end of 1940 there were 160 stations affiliated with Mutual.

Mutual's manner of operation differs from that of CBS and NBC. Mutual has no studios, maintains no engineering department, neither owns nor maintains any facilities for the production of programs and does not originate or produce a network program service such as is maintained by [fol. 237] CBS and NBC. It is an organization devoted mainly to the sale of the time of its affiliated stations for network broadcasting to national advertisers. Its commercial programs are produced by the originating station or by the sponsor who buys time. Its sustaining (or non-commercial) programs are selected from among those produced by affiliated stations themselves, primarily as a part of the sustaining service of the stations for their own local listening audiences.

Network or "chain" broadcasting is defined by the Communications Act of 1934 as the "simultaneous broadcasting of an identical program by two or more stations". The business of operating a nation-wide network consists of supplying such programs of a general and national interest to a large number of radio stations. This is accomplished technically by transmitting the program over wires from a point of origination to each of the stations on the network. Programs are frequently picked up from a number of places in various parts of the world, brought to the central origination point of the network and thence transmitted to the stations. To conduct its business, the network sells the time of its affiliated stations to national advertisers. It contracts to obtain for the advertiser the use of the broadcasting facilities of such of the affiliates as he may select to broadcast the programs.

The normal operation of a national network includes the offering of a continuous flow of programs for a period of

from 16 to 18 hours a day throughout the week. In extraordinary times, during crises in domestic or international affairs, it is not unusual for networks to remain on the air for 24 hours a day in order to be in a position to report events as they occur.

The wires over which the programs are transmitted to the stations are telephone wires of special quality fur- [fol. 238] nished by the American Telephone & Telegraph Company. CBS contracts for program transmission service over wires of this quality for a minimum of 16 hours per day at a cost of over $2,000,000 a year. Thus physical connections are maintained constantly between the network and the affiliated stations.

The network thus performs three major functions: the production of programs for its affiliates to broadcast, the distribution of these programs to its affiliates, and the sale of the time of its affiliates to advertisers.

Network Plant Investments and Program Expenditures

The property and financial resources required for such network operations are substantial. CBS now has (a) in its main office building at 485 Madison Avenue, New York City 12 studios and 128,000 square feet of office space spread over 21 floors of a twenty-four story building, (b) a recently completed special studio building on 52nd Street between Madison and Park Avenues in which are situated 8 additional studios, and (c) several theatres and assembly halls in other parts of New York City. In 1937 CBS completed the construction of outstandingly modern studios and accompanying office space in Los Angeles where there are 10 studios and 14,000 square feet of office space employed in network broadcasting. Similarly in Chicago and in Washington, D. C., where a large number of network programs originate, there are ample studio facilities representing substantial investments. Incidental to the operation of its local stations in St. Louis, Minneapolis, Charlotte and Boston, CBS also maintains studio facilities which are to a lesser degree utilized also as originating points for network programs.

Because of the necessity of supplying a continuous flow of programs for 365 days a year, CBS has expended large [fol. 239] sums of money in order to assure a steady supply of program material of the highest quality. Such expendi-

tures are essential if CBS is to conform to the standards of American network broadcasting which CBS itself has had a major part in developing. To assure the continuance, for instance, of such an outstanding feature as the Sunday afternoon broadcasts of the New York Philharmonic Symphony Orchestra, it enters into a contract with that organization for a period of five years at $75,000 a year. To assure the coverage of world-wide news, it has employed and placed in numerous strategic points abroad news reporters and commentators of outstanding ability to make their observations and reports constantly available to CBS and its affiliated stations. Through its arrangements for continuous wire transmission service to the stations regularly affiliated with it, CBS is enabled on short notice to make it possible for the voice of the President of the United States, of United States senators and congressmen, of cabinet members, of spokesmen for the various political parties, and other speakers with messages important in the administration of government, to reach into the homes of more than 90% of the radio audience. In 1940 alone, CBS expended in excess of $5,000,000 on sustaining programs. By long term contracts for real estate, news services, special programs, and musicians, CBS stands committed to future payments in excess of $4,000,000. Moreover, CBS now reserves about 15 hours each week from sale, in order to present a wide variety of public service programs and other programs devoted to the development of new and improved ideas and techniques of broadcasting, in fields ranging from adult education to popular entertainment. These 15 hours reserved for special purposes by no means represent the total time devoted to sustaining programs.

[fol. 240] CBS has taken the leadership in developing program standards which have raised the level of both sustaining and commercial programs. These standards have been enforced by CBS and have been continually improved practically since the beginning of network broadcasting. They were formalized in a statement which CBS published early in 1935 and have been enforced and amplified ever since. Because of its strict adherence to such high program standards CBS has refused over $6,000,000 of network business tendered to it in a period of four years. A copy of the statement of standards to which commercial programs on the CBS network are required to conform is hereto annexed, marked Exhibit B, and made a part hereof.

6. Assurance of National Circulation. Network broadcasting depends upon the use of networks as a medium of advertising. To be useful to the national advertiser, the network must be able to provide him with an assurance of a nation-wide audience comparable to the assurance of nation-wide circulation provided by the visual media (magazines and other printed publications) having a national distribution. In order to create a national circulation for network programs, a network organization must make exhaustive surveys of the listening patterns for the individual stations affiliated with the network. The determination of network program circulation is itself complex beyond any comparison with that of printed publications. National circulation for radio programs can be guaranteed only when outlets are fitted together like a jigsaw picture, so that there are no interstices or "blind spots" between neighboring affiliated stations. Although the advertiser wishes to purchase a national circulation, he does not wish to spend money for superfluous outlets. It does not satisfy an advertiser to know that an outlet's signal is audible in a particular market—he wants to know that the outlet has a [fol. 241] satisfactory audience there. Surveys of listening patterns made by Columbia from time to time, showing what outlets are preferred by listeners in particular areas, establish that Columbia's network programs are heard in the case of each outlet by an audience which is built up slowly but progressively over substantial periods of time. Columbia uses these surveys as a guide to perfecting the jigsaw picture of national network coverage, and particularly to determine which outlet is needed in a given area to serve the advertiser without uneconomic overlapping of coverage. If the makeup of Columbia's network were to lose its stability through the sudden advent and departure of affiliated stations, listening patterns would fluctuate wildly, and the circulation which today results from the constant performance together of scientifically chosen outlets would not exist. What circulation would be produced if the outlets of a network were in continual flux might not be measurable and the advertiser would be reluctant and very likely even unwilling to buy the immeasurable.

Definite assurance of a substantially nation-wide audience, fitting their own distribution and sales objectives, provides the incentive for advertisers to finance the production of the costly programs which the radio audience enjoys.

It will be seen that this definite assurance requires both that broadcasting stations be available to the network when the network approaches the advertiser, and that the same broadcasting stations still be available when the advertiser finally selects a program period. Nor will the advertiser embark upon the costly venture of a nation-wide radio program series unless the relations between the network he selects and its affiliated stations are sufficiently stable so that he may reasonably expect to maintain his coverage and enjoy the cumulative fruits of his efforts to please the listening public and promote sales of his product. [fol. 242]

This stability, fundamental to the practical existence of network broadcasting, has been achieved by the practice of the network and the station entering into a contract, known in the industry as an affiliation contract, pursuant to which the station becomes the network outlet in the station's service area. The provisions of the contract hereinafter described are indispensable to effective network broadcasting and to the fullest use of the radio facilities of the country.

The Affiliation Contract

Columbia's affiliation contracts are, in most cases, in the form shown in Exhibit "A", annexed to the complaint. The material provisions are substantially as follows:

(a) Columbia agrees to furnish to the station an average of at least 60 hours per week of network sustaining and sponsored programs.

(b) Columbia will furnish all available network sustaining programs without charge. It will furnish to the station all commercial programs which the sponsor requests the station to broadcast. In turn, the station will be paid a specified hourly rate for the use of its facilities in broadcasting network commercial programs. Usually this hourly rate paid to the station is graduated upward as specified totals of network commercial hours are successively attained by the station.

(c) The station will not broadcast programs from any other network, except that it may join occasional local, state, or regional hook-ups to broadcast special events of public importance.

(d) Columbia will not furnish its programs to any other standard broadcast station in the city in which the station is located, except in case of public emergency. [fol. 243]

(e) The station will, upon not less than 28 days' notice from Columbia, broadcast the commercial programs furnished to it by Columbia, provided that:

(1) The station need not broadcast such programs for more than 50 "converted hours" in any one week. A converted hour is one night-ime hour or two daytime hours.

(2) The station may substitute its own sustaining programs devoted to education, public service, or events of public interest, and

(3) The station may reject any network commercial program which it deems not in the public interest.

(f) The station is free to, but is not required to broadcast the network sustaining programs.

(g) The contracts are usually for a term of 5 years with Columbia having the right, in some instances, to terminate on 12 months' notice.

The foregoing contractual provisions embody the essential practices on which the structure of network broadcasting has been built. Preeminent among them are the network's call on the time of its affiliates (item (e) above) and the mutual exclusivity of affiliation (items (c) and (d) above). The importance to the industry of stability in network outlets, to compete with magazines and other publications for national advertising, has already been stated.

[fol. 244] Contribution of Networks to American Broadcasting

Network broadcasting has been an important factor in the development of the broadcasting industry. Many improvements in engineering, in program quality, in the broadcasting of special events of national interest to larger audiences, and in the general character and ethics of the business, have been due to the network method of broadcasting. Network broadcasting made possible a wider reception than could have been obtained in any other way for expensive entertainment and cultural programs. Networks have taken the leadership in the development of programs and program standards, particularly in the matter of new program content in the fields of culture, education, news, and public debate. Network affiliation has been of great

financial advantage to the affiliated stations. The advertiser and the listening public have expressed a decided preference for network as against local broadcasting.

During the entire period in which the standard affiliation practices have been usual and customary in the industry, broadcasting in America has grown remarkably both quantitatively and qualitatively. Its use as an advertising medium has flourished and both networks and network affiliates, as well as many unaffiliated stations, have found themselves on a sound economic basis.

During this period the revenues of affiliated stations, and their share of the revenue from network broadcasting, have increased substantially. The quality of radio programs, both local and network, has substantially improved both in content and variety. Networks and stations have expanded their coverage of the country and the size of the radio audience and the amount of listening have increased, while the cost per listener to advertisers for the use of the CBS network facilities has decreased. This growth of the use of the radio facilities of the nation could not have been accom- [fol. 245] plished without the practices of exclusivity and the call in time.

The Commission and its predecessor have at all times been aware of these practices, and of the provisions of the contracts concerning them. The licenses of all stations having such contracts with CBS have been renewed by the Commission and its predecessor semi-annually during this period, until August 1, 1939, since which time the licenses have been renewed annually. Since 1934 contracts between networks and affiliated stations have been filed by stations with the Commission and considered in connection with applications for renewal of their licenses, requests for increases in power and for new assignment of frequencies. Prior to the report of the Committee referred to below, these provisions to my knowledge have never been criticized or questioned by the Commission or its predecessor in any decision, order, release or any other public statement.

CBS, relying upon the validity and subsisting effect of these practices and agreements, has devoted over $18,000,000 of assets to network broadcasting. Neither the Commission nor its predecessor has ever claimed heretofore the power to regulate the contractual relationships between networks and their affiliated stations.

7. The Chain Broadcasting Investigation, Eventually Culminating in the Amended Order o. October 1941. On March 18, 1938 the Commission, acting on its own motion and not upon a complaint or petition, adopted an order directing an inquiry by the Commission into "the contractual relationships between chain companies and network stations", and divers others matters. A Committee of three members of the Commission was appointed, and opened hearings in the fall of 1938, at which testimony was taken and exhibits were submitted. In June 1940, approximately [fol. 246] one year after hearings closed, the Committee submitted a lengthy report to the Commission. The networks were heard orally and by brief, and in May 1941 a majority of the Commission rendered a printed Report accompanied by an Order containing eight Rules.

After the Commission issued its Report of May 1941, United States Senator Wallace H. White of Maine introduced a resolution to authorize a Senate Commit-ee to investigate the jurisdiction of the Commission to make its Order, and the reasonableness and effect of its Rules. Between June 2 and June 20, 1941 the Senate Committee on Interstate Commerce took the testimony of Chairman James Lawrence Fly of the Commission, and of representatives of all national networks and others, on the question whether Senator White's resolution should be adopted. I shall refer to the printed minutes of these hearings (U. S. Government Printing Office, Washington 1941, 628 pp.) as the "White Committee Hearing".

The Senate Committee adjourned subject to the call of its Chairman. Subsequently counsel for the Commission and its Chairman conferred with representatives of Columbia (which expressly did not waive its objections to the Commission's claim of power) and others. These conferences were without result. On August 14, 1941 Mutual petitioned the Commission to lift the prohibition against exclusive network option time by amending Rule 3.104. Upon this petition the Commission called for briefs and oral argument, but no further testimony, from interested parties, and invited them to discuss all the Rules incorporated in the Report of May 1941. Columbia and the other national networks filed briefs and made oral arguments to the Commission on September 12, 1941. Thereafter, on October 11, 1941, the majority of the Commission issued its Opinion on Rehearing, accompanied by an Order

amending the Order of May and changing three of the [fol. 247] Rules. The said Opinion On Rehearing and Order, and the dissenting opinion of Commissioners Case and Craven are attached as Exhibit "C" to the verified complaint.

That the approach of the Commission majority to the problems in the broadcasting industry was essentially one of academic unreality is evident from the central thesis pursued in the Report of May. This thesis is monopoly by Columbia and NBC. It may best be examined by turning to the Commission's conception of monopoly.

8. The Commission's Conception of "Monopoly"; Competition In "The Network-Station Market". The existing national networks are constantly engaged in vigorous competition for advertising sponsorship of commercial programs, for listeners who will build the goodwill of their outlets, and particularly for the best outlets in all the desirable markets. Every outlet which is affiliated with Columbia today has been free to change its affiliation upon at least one occasion since the formation of Mutual. There is a substantial turnover in the constituency of each national network. Every network makes overtures to stations under contract to competing networks to induce such stations to switch affiliations when their existing contracts expire.

The jurisdictional basis of the entire Commission Order as to chain broadcasting rests, I am informed by counsel and believe, upon the narrow and delicate stem of a single conclusion of fact—the Commission's own conclusion that the public would be better served by radio if existing affiliation practices were to be suppressed, thereby creating a new area of competition in what the Commission calls "the network-station" market.

At page 48 of its Report the Commission asserts:

"NBC and CBS contend that the networks compete, and compete vigorously. Certainly there is a considerable [fol. 248] degree of competition among networks for advertisers and for listening audiences; but this does not mitigate the restraints found with respect to network-station relationships. In the radio broadcasting field, three different markets must be distinguished—the market in which networks and stations meet advertisers, the market

in which networks and stations meet listeners, and the intermediate or internal market where stations meet networks. It is in this intermediate network-station market that current practices have most directly restrained competition; no considerations of the extent to which the networks may compete for advertisers or listeners can conceal the extent to which they do not compete in the network-station market.

"The restraints which we here consider have not been achieved in either of the two more common ways—through coalescence of the networks or through coalescence of the stations. Rather, they have been achieved through coalescence of some stations with one network and other stations with another. But the result is nonetheless to destroy the free market and to substitute for interplay of competitive forces a sort of monolithic rigidity. Stations bound by the usual 5-year exclusive contracts are not free to bargain with other networks for programs; networks are not free to bargain with those stations for time; and the door is closed against new networks. The result is to restrict the flow of programs from producers to listeners."

Columbia's studies show that the flow of programs to listeners is steadiest when the identity of the outlet carrying the programs has become established. A change of outlets carrying a Columbia program upsets the listening patterns for that program, and it takes substantial periods of time before the listening patterns re-form around the new outlet.

This "network-station market" which the Commission is trying to create is not the familiar network-station [fol. 249] market in which networks compete for contract affiliates. Instead, it is a market in which the networks would be in competition anew every time they sought outlets for a network program; where networks would engage in a sort of *over-the-counter, per program competition.* It is an abnormal market in which networks would compete, not for regular affiliates to carry all the network's programs, but for occasional outlets to carry particular programs. The Commission makes entirely clear that by "the network-station market" it means a market where networks compete not merely for contract affiliates but for outlets *on a per program basis.* Thus the Commission complains, in the excerpt quoted above that: "Stations

bound by the usual 5-year exclusive contracts are not free to bargain with other networks *for programs;* [other] networks are not free to bargain with those stations for time;" and so a station which contracts with one network does not have constant access to the programs of every other network. At no time has the Commission been able to show that in creating this artificial market it is not, in obedience to a theory of its own, forcing the established major networks to cease being what they are today and to become something the precise nature of which no one can wholly foresee.

Again, by its October Opinion On Rehearing the Commission reiterates its desire, as stated in the Report of May, to create a new form of competition among networks on the basis of individual periods of the time of outlets. It says (Exhibit "C" to verified Complaint, p. 11):

"An exclusive option effectively removes a station from the station-network market with respect to all the time it covers. The Commission believes that such a serious restraint upon competition is inconsistent with the freely competitive system contemplated by Congress in the Communications Act of 1934. An exclusive option, to the extent [fol. 250] that it encompasses the most valuable broadcast hours, approaches the effectiveness of the exclusivity clauses in affiliation contracts in denying other networks access to a station, and is therefore objectionable for many of the reasons given in the Report for the elimination of exclusive affiliation. Nor is the fact that a given network has utilized a particular period of time over a station any real justification for placing that time under exclusive option. The network which has a contract for a commercial program with a sponsor and which has been sending that program to a number of its affiliated stations throughout a season already has an almost insuperable advantage in selling that program for another year; for commercial program series are frequently renewed year after year. To permit such a network to have an exclusive option over its affiliated stations on the periods used for commercial network programs *would effectively destroy the possibility of competition for those periods.*" (Italics added.)

In the October Opinion on Rehearing the Commission once more criticizes exclusive option time because it "re-

stricted *competition in network programs.*" (Italics added.)

This represents a brand new theory of competition for network programs such as never existed in the broadcasting industry. In the period before NBC adopted a formal affiliation contract, the outlet stations of NBC did not flit from network to network for their national network programs. There was never any such "network-station market" as the Commission has now visualized.

Solid reasons explain why economic forces operating in the real world of the radio industry have not produced any such market. National advertisers would not make use of the radio medium if it did not present a workable means of reaching a nation-wide audience. The instability attendant upon any over-the-counter market for network programs would remove that assurance of an orderly and well-defined [fol. 251] national circulation which is fundamental to the existence of network broadcasting.

Under the present arrangement between Columbia and its affiliates, Columbia assumes the major risks incident to the relationship. Columbia already bears the risk of fluctuations in network commercial business by obligating itself unconditionally to deliver 60 hours of program service per week. Under its contract with affiliates Columbia is obligated to furnish a sustaining program service and in most cases to pay the cost of wire connections with the stations. This obligation must be discharged whether or not Columbia is able to sell to network advertisers the time of its affiliates. This obligation is particularly onerous in periods of economic decline for the radio business. Whatever the relation of commercial program volume to total network service, the 60-hour guaranty of service must be met, and so the cost of sustaining service must advance proportionately as the volume of commercial programs recedes.

9. The Commission's Order Puts An End to Affiliation Practices Essential to the Existence of Network Broadcasting. Taking the Commission's Order of May 2, 1941 and the amended Order of October 11, 1941 together, the Order promulgates eight Rules, five of which are questioned in this action. The Rules not questioned in this action do not subject Columbia to any present injury. The Rules attacked here restrict the right of stations to enter into affiliation contracts with CBS containing the provisions

referred to in paragraph Fifth of the complaint, and in section "6" of this affidavit (page 11 hereof).

The effect of the challenged Rules will be to destroy efficient network broadcasting, reduce the number and quality of nation-wide programs, and make the country's largest and most powerful stations even more dominant at the economic expense of the smaller stations. Instead of [fol. 252] carrying out the professed objective of the Commission, namely, the fullest and most effective use of the radio facilities of the nation, the Order will in fact impair and restrict their use, contrary to the public interest.

The Interdict Against Exclusivity

Rule 3.101 prohibits a station from entering into an agreement with CBS pursuant to which the station agrees that it will not accept network programs from any network except CBS. *Rule 3.102* prohibits a station from entering into an agreement with CBS to obtain CBS's exclusive services within the listening area of the station. These Rules prohibit mutual exclusivity of affiliation between Columbia and its outlet stations. These Rules may well result in breaking up CBS as well as other national networks, and certainly will cause a contraction in the number of network programs, and a lowering in their quality and standards.

Rule 3.102 as amended in October forbids mutual exclusivity and then provides:

"This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization."

Only one station in each area could be given "the first call" upon Columbia's network programs; but the consideration flowing to Columbia for making that one station Columbia's outlet is today the ability to help that station build an audience and to sell that station's time for network commercial programs. *Rule 3.104*, as will be seen, destroys Columbia's opportunity to benefit by the bargain.

This one-way street apparently was devised by the Commission after it had found that under the Rules as promul- [fol. 253] gated it was impossible to meet the objection that, with no two-sided affiliation arrangement between network

and stations, the best programs would gravitate to the most powerful stations and the weaker stations would be impoverished. But the Commission obviously expects established networks to grant this one-way option without any quid pro quo, while an unseemly reward is created for the mere adventurer in radio. Any irresponsible newcomer to the network field is left free to pick the choicest stations on all networks, while organizations with standards and character, having sizeable commitments, are asked to bind themselves to outlets often not the most desirable. This wholly artificial arrangement can only usher in twilight for the present network system.

The interdict against territorial exclusivity strikes directly at the stations. The majority of the more desirable Columbia affiliates have made their network affiliation a part of their identification to the public—to listeners through station announcements on network and non-network programs alike, to the commercial world by styling themselves *the* Columbia outlet in the territory upon their letterheads and in their industry advertising.

The covenant of the affiliated station to the network that the station will not, during the term of the affiliation contract, accept programs from a competing network provides an incentive for CBS to promote sale of the station's time to national advertisers, and protects CBS against the possibility that a competing network will be the beneficiary of the investment made by CBS in such promotion. It also provides the incentive for CBS to produce good sustaining features, to develop an audience for the station which will be of continuing interest to national advertisers. Exclusivity of affiliation permits the station to advertise itself as the CBS outlet in its area, and thus to take advantage of the national prestige of an established network.

[fol. 254] The network advertiser wants the biggest continuous nation-wide audience he can obtain, at a reasonable price and with the assurance that he can retain it so long as his programs are popular. It is just this assurance which exclusivity tends to create.

Under the Commission's Rules the networks would have taken from them the opportunity and inducement to build circulation for themselves and their affiliates on a permanent basis. The Rules place the networks in the position that a newspaper or a magazine would be in if it could

build circulation only to share that circulation with competitors, and if it had no certain stake in its own ingenuity, enterprise and character building.

The Prohibition Against Exclusive Options

Rule 3.104 contained in the order of May 2, 1941 prohibited the station from granting the network an exclusive option upon a certain portion of the station's time. It read:

"3.104. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time."

By the order of October 11, 1941 this Rule was amended to read:

"3.104. No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast [fol. 255] day is divided into 4 segments, as follows: 8 a.m. to 1 p.m.; 1 p.m. to 6 p.m.; 6 p.m. to 11 p.m.; 11 p.m. to 8 a.m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered, by the option, or other time, to other network organizations."

Rule 3.104 as amended continues the absolute prohibition against the giving by stations of exclusive options to networks, but provides that an "option", not exclusive against other network organizations, may be given by a station to national or regional networks (all the Rules are made applicable to regional networks as well) for the broadcasting of network programs during not more than three hours in each of the four segments into which the broadcast day is divided. The Order defines an "option" as

"any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time."

When a network's option upon the time of a station ceases to be "exclusive as against other network organizations", it ceases to be an option. It becames a mere opportunity for the network to offer a program or program series to the stations and try to conclude a contract with enough stations in important markets to satisfy the advertiser. The Commission's October Opinion On Rehearing relates:

"The Commission is not convinced by the contention of NBC and CBS that the optioning of time by networks is [fol. 256] indispensable to network operations, particularly since the chain broadcasting regulations, neither in their original form nor as herein amended, place any restrictions on the bona fide purchase of station time by networks. Networks have heretofore successfully operated without option time. However, it is clear that some optioning of time by networks in order to clear the same period of time over a number of stations for network programs will operate as a business convenience."

This "non-exclusive option" will not enable networks "to clear the same period of time over a number of stations for network programs". If Columbia's "option" during the period from 8 to 10 p.m. on a Tuesday evening means that the time of the outlets is available for Columbia's sponsor *provided* that five other network organizations (national and regional) do not make the station contracts first, then Columbia must contract with its sponsor subject to a sheer gamble that the time can be cleared and the advertising contract performed.

The prohibition of exclusive option time will make the clearing of time for the arrangement of a national network program an almost impossible task. Advertisers do not determine to use network broadcasting to sell their products only 24 hours prior to the time of the program. It sometimes takes months of planning, market study and research,

program planning and negotiations before an advertiser decides whether or not to use network broadcasting and thereafter what stations and programs to utilize. The national advertiser must have nation-wide coverage, both because he sells nationally and because he must give substantially the same support to the distributor and the retailer in all parts of his territory. Advertising efforts must be carefully and scientifically planned. Frequently they are related to an advertiser's whole manufacturing [fol. 257] and merchandising operations as much as a year in advance. Under such circumstances it is practically impossible to sell an advertiser the use of networks, a program idea, program talent and the like, when the network is not able to know and inform the advertiser in advance, what stations and what time the network has to offer; in short, what circulation he could get for the money he would spend. Under the Rule in question, the network might spend months of effort in convincing the sponsor, in helping him select the territory in which to broadcast his program, the stations to utilize, the character of the program, and the talent, and then find itself unable to provide either the stations or the time desired by the advertiser in the markets which he desires to cover.

It would be impossible in practice to operate a network such as that of CBS if CBS did not know in advance what circulation it could deliver, what stations it had to offer and what time on those stations was available for use by prospective advertisers. This is precisely the kind of assurance the visual media are able to provide and the kind of assurance which the advertiser requires before he is able to make any intelligent selection of his medium, before he does, in fact, select his medium.

Notice to Affiliates of Network Commercial Commitments

Existing contracts provide that the affiliate may require not less than 28 days' notice from the network before the affiliate will be called upon to broadcast a network commercial program. Amended *Rule 3.104* provides that the period of notice shall be increased to 56 days, and the Commission explains (Exhibit "C" to verified complaint, p. 8):

"This lengthening of the call period will give stations greater freedom in scheduling local and non-network na-

tional programs during the hours of the broadcast day [fol. 258] which are subject to network option; for such programs, even though subject to be moved, may be assured of at least eight weeks of continuous broadcasting. Nor does it seem that the increase in the call period will seriously affect national network business; for the national networks have pointed out that theirs is a long-range business and that large-scale national advertising network programs are usually planned and arranged for many months and even a year or two ahead of the actual commencement of the broadcasts. Under such circumstances, it does not appear that a 56-day call period will impose any serious hardship upon national network operations."

In the foregoing the Commission strikes a needless blow at the flexibility of the highly competitive network advertising business. I have already pointed out the frequent need for the ability to negotiate with advertisers well in advance with the assurance of being able to deliver if we make a sale. On the other hand, a variety of reasons in the industrial world will cause advertisers to desire to start an advertising campaign swiftly. Newspapers and magazines will continue to be able to accommodate such advertisers, whereas network broadcasting will be working under an unnecessary handicap which will weaken it in competition with other media and cause it to lose important business.

Minimum Network Service and Sustaining Programs

Of course under the Rules the network cannot agree, as it does now, to supply a minimum number of hours per week of network sustaining and sponsored programs, at a time when all certainty as to the outlets for network commercial programs is destroyed.

The sustaining program service provisions of the present contracts will go out because existing incentives for the production of sustaining programs will cease.

[fol. 259] The inevitable result will be the decline of the networks as producers and suppliers of programs which the stations now receiving such programs are unable to provide for themselves. Thus networks are relegated principally to the role of time brokers, agencies for the sale to network advertisers of the time of such stations as will engage them to make such sales. It will enable anyone, without the necessity of having a network organization geared to

the production of network programs of quality, to buy wire connections and sell the time of whatever stations he can obtain, for any specific commercial programs. Not being subject to the expense of operating an organization for the building of programs, with the investment which that entails, such agencies will be in a position to cut the rates to the advertiser, or to give to the station a greater share of the network revenue. Indeed it would be perfectly possible for such an organization both to cut the rates to the advertiser and to give the station a greater share of the revenue, as a result of operating without the trained personnel, the elaborate organization, the talent commitments, and all the other investments and expenses, which make possible the operation of a major network like CBS. The result of the Commission's Order will be to encourage irresponsible fly-by-night operations on a get-rich-quick basis and to prejudice the permanent and stable network system which now obtains.

Unlike Columbia, Mutual has no studios, maintains no engineering department and does not produce programs, except European news broadcasts. It is thus relieved of the expense incidental to such operations and to which CBS is now subject. Mutual is in a position, once these Rules take effect, to charge less than CBS or NBC for obtaining the use of the facilities of the same stations which CBS or NBC would be in a position to offer.

[fol. 260] Moreover, unless the networks can be forced to adopt the one-way options to which I have adverted, these Rules will result in the best programs gravitating to the most powerful stations in each community. The lower powered and smaller stations will not then get the program service they now receive from their exclusive affiliation with one of the networks. The smaller stations, deprived of some of the better programs, will receive whatever programs cannot find a place on the larger stations; they will, therefore, encounter shrinking audiences, decrease in their revenue and the inevitable contraction in their public service. It should be emphasized that under the existing contractual arrangements Columbia has been able to maintain many of the less desirable stations as constituent parts of its network to the great benefit of these stations and their audiences. Such stations have been able to gain and hold substantial and often predominant audiences in their communities by virtue of Columbia's commercial and sus-

taining services. Extension of its network services to such stations has been profitable to Columbia so long as a common bond has existed between Columbia and the stations. This is the bond which the Commission is arbitrarily severing now.

With the loss of exclusive affiliation and of option time, the networks will be put in the position of being desperately compelled to maintain sales at all costs and therefore will not dare to enforce their present policies and practices or high program standards. Moreover, there must then be an end to the practice of withholding network time from sale in order to devote it to public purposes. Once the existing affiliate relationship is destroyed, networks will have "affiliates" only on a commercial basis, that is, only when and to the extent that the time of certain station can be sold and cleared for commercial programs. In such circumstances [fol. 261] it is difficult to see how network public service programs can ever be scheduled on a sustaining basis.

CBS is budgeting $500,000 a year for the operation of a Latin-American network. It is developing television at an annual expenditure of $800,000 a year. It is expending approximately $500,000 a year to cover every phase of the European war and the concurrent developments in America in relation to it. It derives absolutely no income whatever from the Latin-American network or television, and does not expect to derive any material income from these services for some time to come. A contraction in network income from the breakdown of the principle of exclusive affiliation and option time must certainly result in a contraction of these services which are today financed from current operations.

The Two-Year Limitation Upon Contracts

The duration of affiliation contracts, now usually five years, is fixed by *Rule 3.103* at two years.

As a matter of business necessity, the relationship between the network and the station must be of substantial duration if the network is to carry out its functions effectively. Since one of the principal functions of the network is that of making the facilities of stations available to the advertiser it is essential that it be assured that the facilities to be offered to prospective users be available for a substantial length of time. The printed national advertising media

have permanent assurance of the availability of advertising facilities. If networks are to compete on an equal basis with these media, they cannot be subject to the disadvantage of not being assured of facilities.

The network would not have been justified in making the substantial capital investment and large expenditures currently necessary for effective network operation, if it could not be assured of the availability of outlets for a substan- [fol. 262] tial length of time. As the business is conducted today, long-term contracts and investments must be made to provide offices, studios, studio and technical facilities, et cetera. Moreover, not a single compensating advantage to the public would result from a short-term restriction.

Investments of the kind which an outlet must make cannot be justified on a temporary basis. The licensee of a station is able and willing, and usually eager, to make these long-term engagements because he has a reasonable expectation that his license will be renewed continuously. Station licenses have been regularly renewed by the Commission and its predecessor, the percentage of denials of renewals having been only a small fraction of one per cent of renewal applications. The rights of the public are adequately safeguarded by the present practice.

The Commission explains that in October it

"concludes that a two-year affiliation contract will permit a reasonable measure of stability in network-station relationships without at the same time seriously interfering with competition in the network-station market. Of course, what precise limit on the duration of affiliation contracts is most desirable is a matter of judgment. A two-year affiliation contract represents a substantial diminution from the five-year term currently being utilized by NBC and CBS, and may be expected to remove that restraint upon competition and give freer play to competitive factors by making possible readjustments between stations and networks on a biennial basis."

But if networks are to engage in free-for-all competition on a per-program basis, with the first network which sells a particular period having the station as its outlet for that period, then affiliation has lost all its meaning and the contract period could as well have a twenty-year duration as a two-year one.

[fol. 263] Right of Stations to Reject Network Programs

Rule 3.105 prohibits the station from making any contract with a network which prevents the station from rejecting network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which prevents the station from rejecting a program already contracted for which, in the opinion of the station, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

If it is intended by this Rule to secure stations in their right to substitute sustaining programs of outstanding local or national importance for a network program, there can be no complaint concerning it. The CBS affiliation contract annexed to the complaint contains a provision which preserves this right. If, however, as its wording suggests, this Rule proposes to enable stations to reject network commercial programs which they have already agreed to accept, simply because the station prefers another commercial program, the Rule will discourage the use of networks by advertisers. Networks and sponsors incur substantial expenditures for wire transmission, studios, talent and the like. They are entitled to know that a station which has agreed to accept a program will not reject it in favor of the program of some other sponsor, justifying its breach of faith by invoking a Rule of the Commission. Under such circumstances sponsors would not contract for network time. Hence, this Rule will discourage the use of networks by advertisers.

Summary

The combined effect of the Rules complained of would be to destroy the present structure of network broadcasting. Burdens will be imposed upon that structure which will render it less able to meet the needs of the advertiser. A [fol. 264] decline in the ability to meet the advertisers' needs will mean a decline in the use of network broadcasting by advertisers and in consequence a reduction in the revenues. The result of this will be less program service, then fewer listeners, and so begins a descending spiral in revenues, rendering the stations less able to serve the public interest. The inevitable result of the Rules must therefore be to impair the full, effective and best use of the radio facilities of the country.

Moreover, the Rules will compel CBS to alter fundamentally the structure and character of its business. In its present method of operation, CBS delivers sustaining programs to the station without direct charge for programs and in most instances without charge for telephone wires to deliver them, and it shares the revenue from commercial programs with the station. CBS is compensated for the costs of producing its sustaining program service, and the cost of the wires necessary to deliver that service, by having the station as an exclusive affiliate, by having an option upon its time for network sales, and by its share of the revenue from network broadcasting. Under the Rules, the service provided to the station by CBS can no longer bring these compensations.

Finally, the broadcasting business is being thrown into confusion and uncertainty by the effect of the Rules upon advertisers, stations and networks. Some advertisers are uncertain and disturbed by the inability of the networks to assure availability of outlets. For this reason they are considering the diversion of their advertising expenditures to other media. Confusion and complications are attendant upon the wire arrangements to be made for program distribution under the Rules. The cost of permanent wire connections to all stations by any single network is prohibitive. There is no way of telling to which stations CBS should [fol. 265] obtain permanent wire connections; the number and the cost of temporary wire connections cannot be determined.

There is confusion and uncertainty as to which stations will be connected by wire to which networks for purposes of national defense and national emergency. CBS has been unable to determine how and under what conditions sustaining programs will be delivered and to which stations. The Commission itself is unable to determine how networks will operate under the Rules as promulgated.

Networks are today the greatest and most expeditious means of mass dissemination of news, information and public discussion. They are peculiarly a vital factor of national defense in the present emergency. The inevitable uncertainty, chaos and confusion which the Rules will cause is contrary to the public interest.

10. Irreparable Injury. The Rules impair Columbia's freedom and ability to enter into the affiliation contracts

described in the complaint and in this affidavit. Chairman Fly has stated that any station which had such a contract after the effective date of the Rules would lose its license. As to existing contracts the Rules are to take effect November 15, 1941. In all other respects the Rules became effective May 2, 1941.

Breaches of Affiliation Contracts

Some stations having such contracts with CBS are refusing to renew them; some stations having such contracts are threatening to cancel or repudiate them and some stations have already cancelled or repudiated such contracts, on the ground that the Rules prohibit them. The stations are refusing to renew such contracts because of the drastic penalty for entering into contracts in violation of the Rules, in the event they are held to be valid.

[fol. 266] Interference With Business Relations

Columbia is required to contract for adequate space, technical equipment and program material in advance in order to carry on its normal course of business. Because of the uncertainty as to whether it will obtain relief from these Rules, Columbia is now unable to contract and arrange for such program material, technical facilities and the like. The Commission's Order has already made advertisers doubtful of the continuance of network service, of the availability of network facilities and of the performance of the existing network facilities contracts. This situation seriously jeopardizes Columbia's revenues, the orderly conduct of its business, and its ability to continue its present program policy and service.

Need for Interim Relief

Immediate injunctive relief is necessary to protect Columbia's business from disruption. A final adjudication, after a full hearing by this Court, that the Rules are invalid would, in the absence of interim protection, leave the plaintiff irreparably injured. Affiliated stations have already taken action jeopardizing Columbia's business and the continuity of its services, and advertisers have already indicated serious doubt as to the continuance of their present arrangements. Graver jeopardy is imminent. Not later

than the date when the Rules become applicable to existing contractual relations, existing values will be destroyed beyond repair.

Listeners will be lost and advertisers will be diverted to other media and in result the plaintiff will lose its goodwill, built up through its having furnished a regular, uninterrupted service for many years. Unless temporary relief maintaining the status quo until a determination of the [fol. 267] validity of the Rules be granted, plaintiff's final relief in this action will be futile. Since the industry has functioned with public approval for over fourteen years, and since no interest is harmed by its present operations, no injury will result from suspending the Rules until final disposition of this case.

William S. Paley.

Subscribed and sworn to before me this 30th day of October, 1941. Margaret E. Land[illegible], Notary Public, Westchester County. Certificate Filed in N. Y. Co. Clk's No. 940, Reg. No. 2 L 573. Term Expires March 30, 1942.

EXHIBIT "A" TO AFFIDAVIT

Columbia Broadcasting System, Inc. and Subsidiary Companies

Consolidated Balance Sheet as at December 28, 1940

Assets

Current Assets:		
Cash in banks and on hand		$7,570,151.01
Notes and accounts receivable, less reserves for time discounts and doubtful accounts, December 28, 1940—$278,248.76, December 30, 1939—$150,937.44		3,829,081.35
Inventories, at cost or market, whichever was lower		986,876.19
Total Current Assets		$12,386,108.55
Sundry Investments, Advances and Receivables, less reserves		$196,141.08
Investments in and Advances to Affiliated Companies, less reserves		$69,351.00
Prepaid Insurance, Taxes, Rents, Etc.		$531,182.93
Fixed Assets, at cost:		
Land		$2,239,516.17
Buildings, equipment and improvements to leased premises	$7,908,124.03	
Less—Reserves for depreciation and amortization	2,998,996.65	
	$4,909,127.38	
Fixed Assets, less reserves		$7,148,643.55
Goodwill, representing premiums paid for capital stock of merged subsidiaries formerly consolidated		$2,000,115.94
		$22,331,543.05

Liabilities and Capital

Current Liabilities:		
Notes payable to banks		$200,000.00
Accounts payable and sundry accruals		3,111,250.29
Reserve for Federal income and excess profits taxes		2,425,000.00
Mortgage instalments due within one year		155,800.00
Total Current Liabilities		$5,892,050.29
Deferred Income		$29,689.34
Mortgages Payable (including $40,000 standing demand)		$1,421,350.00
Notes Payable to Banks, Due After One Year		$400,000.00
Reserve for Contingencies		$222,707.54
Capital and Surplus:		
Capital stock—$2.50 par value:		
Authorized—1,500,000 shares each Class A and B (Note 1)		
Issued — 960,203 shares of Class A and 948,674 shares of Class B at December 28, 1940		$4,772,192.50
Capital surplus, representing excess of proceeds from sales of option stock over the par value thereof		146,809.20
Earned surplus		10,502,414.82
		$15,421,416.52
Less—Cost of 2,850 shares of Class A stock and 189,750 shares of Class B stock reacquired and held in treasury		1,055,670.64
Total Capital and Surplus		$14,365,745.88
		$22,331,543.05

[fol. 269] EXHIBIT "B" TO AFFIDAVIT

Statement of the Columbia Broadcasting System to the public, to advertisers, and to advertising agencies (May 15, 1935).

As radio broadcasting expands its audience and augments its influence, there devolves upon the broadcaster and the program sponsor an ever greater responsibility.

Similarly, as radio continues to become a more intimate force in the lives of people, they tend to be more sensitive to broadcasting they like and to broadcasting they do not like. It is incumbent upon the broadcaster constantly to examine general policy so as to assure steady progress in building and holding radio's audience. Such watchfulness serves the interests of the audience, of the advertiser, and of the broadcasting companies alike.

The Columbia Broadcasting System has given particular consideration to recent trends in two general types of commercial program: those which are designed for children, and those involving unpleasant discussions of bodily functions, bodily symptoms, or other matters which similarly infringe on good taste. In addition, as a result of expressed public interest, careful study has been given to the amount of time that should be used by sponsors for their advertising messages.

Children's programs

Wide variations in viewpoint exist among parents as to programs which they regard as suitable for their children to hear, and similar differences exist between parents and children. The same divergence of opinion is frequently found among authorities.

Commercial sponsors of broadcasts addressed to children are devoting great effort and much money to creating programs that merit the approval both of child and parent. [fol. 270] It is also true that there have been instances of poor judgment and careless execution. To eliminate such faults would be gratifying to all those who feel a deep responsibility for the rearing and education of impressionable youth.

The Columbia Broadcasting System has no thought of setting itself up as an arbiter of what is proper for children to hear; but it does have an editorial responsibility to the

community, in the interpretation of public wish and sentiment, which cannot be waived.

In accordance with this responsibility we list some specific themes and dramatic treatments which are not to be permitted in broadcasts for children.

The exalting, as modern heroes, of gangsters, criminals and racketeers will not be allowed.

Disrespect for either parental or other proper authority must not be glorified or encouraged.

Cruelty, greed and selfishness must not be presented as worthy motivations.

Programs that arouse harmful nervous reactions in the child must not be presented.

Conceit, smugness, or an unwarranted sense of superiority over others less fortunate may not be presented as laudable.

Recklessness and abandon must not be falsely identified with a healthy spirit of adventure.

Unfair exploitation of others for personal gain must not be made praiseworthy.

Dishonesty and deceit are not to be made appealing or attractive to the child.

We realize that distinctions in aesthetic values and feeling which may be wholly obvious between two given treatments of dramatic material cannot always be easily speci- [fol. 271] fied in words. Thus, for instance, it is not easy to capture in definition the fine distinctions between the pure fantasy which comprises some of the world's greatest literature for children, and the fantastic distortion of realities which is unsuitable for a youthful audience. None the less, the differences between these forms of entertainment become rather obvious when the two are compared side by side.

A program for children of elementary school age should offer entertainment of a moral character in the widest social sense. It should not obtain its entertainment value at the cost of distorting ethical and social relationships in a manner prejudicial to sound character development and emotional welfare.

In general, it is worth noting that the literature for children which continues to find their favor through many generations offers heroes worthy of the child's ready impulse to hero worship, and of his imitative urge to pattern him-

self after the hero model. Such literature, whether created 100 years ago or written today, succeeds in inspiring the child to socially useful and laudable ideals such as generosity, industry, kindness and respect for authority; it opens doors into wide worlds that may be reality or fantasy, but are in neither event ugly or repellent in aspect; it serves, in effect, as a useful adjunct to that education which the growing and impressionable child is absorbing during every moment of its waking day.

It is our hope and purpose to stimulate the creation of a better standard in children's programs than has yet been achieved.

To be of assistance in reaching this goal, Columbia is engaging the services of an eminent child-psychologist who will have the benefit of an advisory board of qualified members, with the special purpose of pointing the way toward programs designed to meet the approval of parents, chil- [fol. 272] dren and educators alike. Columbia hopes thus to be equipped to appreciate and apply the parent's practical point of view no less than to reflect studied scientific judgment. The name of this consulting authority, and the membership of this committee, will be announced soon; and the new policy becomes completely effective July 30.

Advertising Which Discusses Internal Bodily Functions, Symptoms, etc.

The Columbia Broadcasting System has concluded, after serious consideration, to permit no broadcasting for any product which describes graphically or repellently any internal bodily functions, symptomatic results of internal disturbances, or matters which are generally not considered acceptable topics in social groups.

This policy will specifically exclude from the Columbia Network not only all advertising of laxatives as such, but the advertising of any laxative properties in any other product. It will further exclude the discussion of depilatories, deodorants, and other broadcasting which, by its nature, presents questions of good taste in connection with radio listening.

As to new business, this policy becomes effective immediately, May 15, 1935. As to existing business, it becomes effective as rapidly as present commitments with clients expire. The last of these expires in March, 1936. Meanwhile, the advertising continuities for any such product are

to be so worded as to conform strictly with a specific standard of new requirements.

Many programs containing such advertising in the past have offered entertainment of great merit, judged by the strictest standards.

[fol. 273] On the other hand, many people prefer not to hear such advertising over the radio, regardless of the excellence of the program. The reason for this viewpoint is obvious: radio broadcasting is heard by mixed and assorted groups of all kinds, in the home, in restaurants, and in public meeting places. In certain groups a listener may find it distasteful to hear a discussion of some subject which under other circumstances he finds wholly fitting and proper.

Similarly, we realize that the personal and often intimate quality of the human voice, radio's medium of presenting its sponsors' messages, forbids discussing subjects on the air in a manner which might be wholly acceptable when read in type.

Commercial Announcements

In the last several years advertisers and agencies have themselves been responsible, in many instances, for the discovery that brief and skillful handling of the commercial announcement—rather than obviously excessive and insistent sales talk—creates effective response and universal commendation and good will.

The Columbia Broadcasting System recognizes, with many advertisers and with the public, the desirability of avoiding advertising announcements that are too lengthy or too frequent.

As a result, numerous advertisers have condensed their sales announcements to a marked extent, to their own satisfaction and the demonstrated approval of the listening audience.

With the interest of the audience and of the great majority of advertisers in mind, the Columbia Broadcasting System considers it desirable, at this time, to set the following maximum allowances for commercial announcements, effective July 30, 1935:

[fol. 274] Evening Programs

A maximum of 10 per cent of the total broadcasting period may be devoted to the sponsor's commercial announcements,

including contests and offers, on programs broadcast after 6:00 P. M. This applies to all full-hour programs, three-quarter hour programs, and half-hour programs. A single exception to the ten per cent ratio will be made on quarter-hour programs, on which an additional allowance not to exceed 40 seconds will be made in recognition of the fact that the short program necessarily requires as much time as the longer one for routine identification announcements.

The following table shows, in minutes and seconds, the maximum amount of commercial talk which will be permitted, under these limits, on programs of various lengths broadcast after 6:00 P. M.:

Full-hour programs:

All commercial announcements not to total more than

6 minutes

Three-quarter hour programs:

All commercial announcements not to total more than

4 minutes 30 seconds

Half-hour programs:

All commercial announcements not to total more than

3 minutes

Quarter-hour programs:

All commercial announcements not to total more than 2 minutes 10 seconds

[fol. 275] Unpleasantly rapid delivery of the sales message, to effect a crowding of excessive material into the period allowed for the commercial announcement, will not be permitted.

Daytime Programs

The Columbia Broadcasting System has decided on a lesser curtailment of the amount of advertising in day-time programs for a number of reasons. Programs broadcast during the morning and afternoon hours serve vast numbers of women as a medium of useful information. Many of these programs are educative in both cultural and prac-

tical fields. Many of them offer valuable help in solving household economic problems, discussion of which requires more detailed statement of the sponsor's service or product. To deprive the daytime listener of such discussion would subtract from the broad usefulness of radio broadcasting.

Sponsored programs in the daytime will accordingly be allowed a maximum of 15 per cent of the total broadcast period for commercial announcements, with an additional 40 seconds on the quarter-hour program.

Public Acceptance

We are satisfied that the best thought of many leading advertisers as well as of the broadcasting industry is reflected in these policies. They set higher standards than broadcasting has attempted before.

We have adopted them after years of experience and careful consideration of every aspect of the problems involved. For these new policies, we ask the full cooperation of the public, the advertiser and the broadcasting industry.

Basic Advertising Policies

The three important new policies set forth in the foregoing statement represents an extension of basic Columbia [fols. 276-277] policies with which advertisers and advertising agencies have long been familiar, and which have served to maintain commercial broadcasting on the Columbia Network on a high ethical plane. These basic points of policy, most of which have been in effect since the inception of the Columbia Network, are here re-stated:

1. No false or unwarranted claims for any product or service.

2. No infringements of another advertiser's rights through plagiarism or unfair imitation of either program idea or copy.

3. No disparagement of competitors or competitive goods.

4. No lottery or "drawing contest." No contest of any kind in which the public is unfairly treated.

5. No programs or announcements that are slanderous, obscene, or profane, either in theme or in treatment.

6. No ambiguous statements that may be misleading to the listening audience.

7. Not more than two price mentions on a 15-minute program.

Not more than three price mentions on a half-hour program.

Not more than five price mentions on a full-hour program.

8. No advertising matter, or announcements, or programs which may, in the opinion of the System, be injurious or prejudicial to the interests of the public, the Columbia Broadcasting System, or honest advertising and reputable business in general.

9. No appeals for funds.

10. No testimonials which cannot be authenticated.

[fol. 278] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HERBERT V. AKERBERG IN SUPPORT OF THE MOTION OF PLAINTIFF COLUMBIA BROADCASTING SYSTEM, INC., FOR A PRELIMINARY INJUNCTION

I, HERBERT V. AKERBERG, being first duly sworn, do depose and say:

1. I am employed by the Columbia Broadcasting System, Inc., the plaintiff in this action, as Vice President in charge of Station Relations. I have been employed in this capacity since 1936. As Vice President I am in charge of and supervise the work of the Station Relations Department. From 1933 to 1936, I was General Manager of this department and my duties were substantially what they are now.

2. I have been employed in the broadcasting industry continuously since 1922. From 1922 to 1928 I managed and operated two broadcast stations in Columbus, Ohio. From 1928 to 1929 I was employed by the Bell Telephone Laboratories as Radio Installation Design Engineer. In that ca-
[fol. 279] pacity, I designed and laid out the studios, the studio equipment and the physical layout of the Columbia Broadcasting System. I was first employed by Columbia

Broadcasting System, Inc. in 1929, as Assistant Chief Engineer, became Chief Engineer about six months later and continued as such until 1931. In that capacity I supervised the technical operations of the network. From 1931 to 1933 I was relieved of administrative duties as Chief Engineer and devoted my time to studying methods of improving the physical and technical aspects of Columbia's network operations, and advising the affiliates on the improvement of their technical facilities.

3. The Station Relations Department of Columbia negotiates all contracts and renewals of contracts with broadcast stations for their affiliation with the Columbia network. It also administers the performance of these agreements by Columbia. This involves the furnishing of sustaining program service, the financial relations between Columbia and the stations, consultation with and advice to the stations on their engineering, sales, program, financial, public relations and other problems.

4. Since the department first came under my supervision in 1933, we have negotiated hundreds of affiliation contracts or renewals of existing affiliation agreements. Negotiations for affiliation of stations not yet affiliated with the network ordinarily require from three months to a year to be consummated; negotiations for renewal of expiring existing contracts ordinarily require from one to six months time.

In the ordinary course of business we begin to negotiate for the renewal of existing contracts from six months to a year prior to the date of termination of the contract. In some instances, where the circumstances require it, we have [fol. 280] begun negotiations for the renewal of an existing contract as long as two years prior to its termination. Columbia has regular affiliation relationships with 115 stations licensed by the Federal Communications Commission; the termination dates of the contracts are staggered and the contracts terminate in different years and at different times during the year. The Station Relations Department is therefore continually engaged in commencing, continuing and completing negotiations with various stations for affiliation agreements or for the renewal of such agreements. On or about May 2, 1941 we were engaged in conducting negotiations with various affiliates for the renewal of their affiliation agreements. The names of such stations and the

expiration dates of the contracts and of their licenses follow:

Station	Location	Contract Expiration Date	License Expiration Date
KFBB	Great Falls, Mont	Aug. 8, 1941	June 1, 1941
KGVO	Missoula, Mont	Aug. 8, 1941	June 1, 1941
CKAC	Montreal, Canada	Oct. 4, 1941	—
WHIO	Dayton, Ohio	Dec. 14, 1941	June 1, 1941
WIBX	Utica, N. Y.	Dec. 31, 1941	Oct. 1, 1941
WISN	Milwaukee, Wisc.	Dec. 31, 1941	June 1, 1941
WCHS	Charleston, W. Va.	Feb. 13, 1942	April 1, 1942
WPAR	Charleston, W. Va.	Feb. 13, 1942	Dec. 1, 1941
WMAZ	Macon, Ga.	April 3, 1942	Feb. 1, 1942
WNBF	Binghamton, N. Y.	April 4, 1942	Dec. 1, 1941
WHCU	Ithaca, N. Y.	April 4, 1942	Feb. 1, 1942
WDBO	Orlando, Fla.	April 14, 1942	April 1, 1942
WKBH	LaCrosse, Wisc.	April 24, 1942	Aug. 1, 1941
KGMB	Honolulu	May 1, 1942	April 1, 1942
KHBC	Honolulu	May 1, 1942	Oct. 1, 1941
WWNC	Asheville, N. C.	May 29, 1942	April 1, 1942
WDAE	Tampa, Fla.	July 14, 1942	June 1, 1941
WMT	Cedar Rapids, Iowa	Dec. 31, 1942	April 1, 1942
KRNT	Des Moines, Iowa	Dec. 31, 1942	Aug. 1, 1941
WHAS	Louisville, Ky.	Jan. 27, 1943	Feb. 1, 1942
WWL	New Orleans, La.	Nov. 19, 1943	Feb. 1, 1942

Negotiations for the renewal of affiliation contracts had been progressing with these stations for some time. All of the contracts subsisting between Columbia and such sta- [fol. 281] tions, and for the renewal of which negotiations were proceeding between such stations and Columbia on or about May 2, 1941, contained clauses referred to in Paragraph Fifth of the Complaint in this action. These clauses have been the foundation of successful network operation and they are necessary to the continued existence of strong and successful network operation.

5. As a result of the Commission Order of May 2, 1941, negotiations with reference to the renewal of these agreements with the stations have been terminated because the order prohibits any licensee from entering into such contracts, under the penalty of the denial of the renewal of its license.

In addition the Station Relations Department has been negotiating with Station WGBR, Goldsborough, N. C., and Station WGTM, Wilson, N. C. for affiliation agreements of the kind specified in Paragraph Fifth of the Complaint. These negotiations have ceased because of the danger of the denial of their licenses if they should enter into such agreements. As the result of the Commission Order and its effect upon negotiation with stations for contracts or

renewal thereof, the Station Relations Department has ceased functioning in these matters completely and is unable to continue the regular conduct of its business.

6. Not later than November 15, 1941 when the said Order becomes effective as to existing contracts,* all the existing contracts of affiliation between Columbia and licensees of the Commission must be abrogated or repudiated by these stations or they will face the certain denial of their licenses. [fol. 282] As a result, many stations have threatened that they will cancel or repudiate their contracts of affiliation prior to the effective date of the said order, and many stations have already done so, as indicated by communications received from such stations, copies of some of which are hereto annexed and marked Exhibits "A" to "T", inclusive.

Herbert V. Akerberg.

Subscribed and sworn to before me this 29th day of October, 1941. Margaret E. Landry, Notary Public, Westchester County. N. Y. Co. Clk's No. 940, Reg. No. 2 L 573. Term Expires March 30, 1942.

[fol. 283] EXHIBIT "A" TO AFFIDAVIT

WADC Broadcasting Station
Basic Member Columbia Network
Akron, Ohio

May 20, 1941.

Columbia Broadcasting System, Inc.,
485 Madison Avenue,
New York, New York.

GENTLEMEN:

Reference is made to the contract dated June 4, 1938, between your corporation and me, governing the affiliation of my station, WADC, with your network.

---

* Originally set for July 31, 1941, this effective date was postponed by the Commission, first to September 16, 1941, and later to such date as the Commission might fix. On October 11, 1941 the Commission issued a supplemental order fixing this effective date at November 15, 1941.

Paragraph nine of that contract provides: "The obligations under this agreement are subject to all applicable laws, rules and regulations, present and future, especially including rules and regulations of the Federal Communications Commission."

You are, no doubt, familiar with the requirements enacted by the Federal Communications Commission May 2, 1941, numbered as sections 3.101 to 3.108 of the Rules and Regulations. Those requirements became effective on the date of their announcement and must be complied with within ninety days. As you know, the Commission's new regulations effectuate certain policies with regard to network broadcasting by imposing requirements upon licensees, rather than upon network organizations.

The impact of these regulations is such that any failure to comply with them will endanger my license and its renewal. Each section of the rules commences: "No license shall be granted to a standard broadcast station" etc.

Therefore, under the provisions of the Commission's new regulations and conformable to the provisions of para- [fol. 284] graph nine above quoted, I must, to preserve my property, come to a clear understanding with you as to the changes in our relationship brought about by our new status and obligations under the regulations.

I have considered the question of whether or not my contract stands amended by operation of law, as might be considered provided by paragraph nine, and have come to the view that any such amendment, if it exists, is insufficient to protect my interests. Since the prohibition of the regulations extends against "any contract, arrangement, or understanding, express or implied", I am certain that specific exclusion must be had of any such arrangements.

My present contract violates the Commission's regulations in several important respects.

I shall, therefore, be compelled to cancel that contract and cease affiliation with your network unless it is now possible to work out a revision of the contract which will bring me within the requirements of the Commission.

Accordingly, I propose certain specific amendments to the contract.

Paragraph two of the contract provides as follows:

"2. The Station will broadcast all sponsored programs offered to it by Columbia during the time when the station

is licensed to operate, but need not (except in occasional instances of sponsorship of special events, such as World Series broadcasts, not exceeding two weeks in duration at any one time) accept programs in excess of fifty 'converted hours' (as defined below, but computed, during the entire term of this agreement, on the basis of the differences in rates at different hours specified in Columbia's Rate Card No. 23) per week. The Station may require Columbia to [fol. 285] give not less than twenty-eight days prior notice of the commencement of sponsored programs for new accounts. Either the Station or Columbia may on special occasions substitute for one or more of such sponsored programs sustaining programs devoted to education, public service or events of public interest without any obligation to make any payment on account thereof, and in the event of such substitution by either party, it will notify the other by wire as soon as practicable after deciding to make such substitution. In case the Station has reasonable objection to any such sponsored program or the product advertised thereon as not being in the public interest the Station may, on three weeks' prior notice thereof to Columbia, refuse to broadcast such program, unless during such notice period such reasonable objection of the Station shall be satisfied. The Station will not make spot announcements in the 'break' occurring in the course of a single network program or contiguous programs for the same sponsor and will, at the request of Columbia, desist from making commercial spot announcements in the 'break' occurring before or after specified network programs."

This must now be changed to read:

"2. The Station will broadcast all sponsored programs offered to it by Columbia during the time when the station is licensed to operate and which, prior to the broadcasting thereof, have been accepted by the Station for broadcasting. The Station may require Columbia to give not less than twenty-eight days prior notice of the commencement [fol. 286] of sponsored programs for new accounts. Columbia may on special occasions substitute for one or more of such sponsored programs sustaining programs devoted to education, public service or events of public interest, without any obligation to make any payment on account thereof and in the event of such substitution Columbia will

notify the station by wire as soon as practicable after deciding to make such substitutions. Nothing herein contained shall be understood or construed to prevent or hinder the station from scheduling programs before Columbia finally agrees to utilize the time during which such programs are scheduled, nor to require the station to clear time already scheduled when Columbia seeks to utilize the time. Nothing herein contained shall be construed or understood with respect to programs offered pursuant to this contract to prevent or hinder the station from rejecting or refusing programs which the Station reasonably believes to be unsatisfactory or unsuitable or, with respect to Columbia programs, so offered and already contracted for, to prevent the station from rejecting or refusing any program which in its opinion is contrary to the public interest, or from substituting a program of outstanding local or national importance. The Station will not make spot announcements in the 'break' occurring in the course of a single network program of contiguous programs for the same sponsor and will at the request of Columbia desist from making commercial spot announcements in the 'break' occuring before or after specified network programs."

I suggest the elimination of the following language from paragraph five of the contract:

[fol. 287] "and will maintain such licenses under copyrights as are necessary to enable the Station to broadcast the programs to be furnished by Columbia."

The second sentence of paragraph six provides:

"In the event of any change of programs, Columbia will notify the station as soon as possible, and the Station will make every effort immediately to conform with the substituted programs."

There should be added at the end of this provision the following additional language:

"subject, however, to all of the standards and requirements of paragraph two hereof."

Paragraph eight of the contract now provides as follows:

"8. Columbia will continue the Station as the exclusive Columbia outlet in the city in which the Station is located and will so publicize the Station, and will not furnish its

exclusive network programs to any other station in that city, except in case of public emergency. The Station will operate as the exclusive Columbia outlet in such city and will so publicize itself, and will not join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations. The Station shall be free to join occasional local, statewide or regional hook-ups to broadcast special events of public importance."

This must now be changed to read:

"Nothing herein contained shall mean or shall be con-
[fol. 288] strued to mean that the Station is in any manner prevented or hindered from or penalized for broadcasting the programs of any network organization other than Columbia. The Station asserts no rights under this agreement or otherwise to prevent or hinder Columbia from delivering all or any of its programs for transmission by any other station whatsoever."

Paragraph twelve must be so amended as to provide that the duration of the contract shall not exceed one year from the time that we have completed our negotiations for the amendments requested in this letter.

Please give this matter your immediate attention, as it is of importance to me in maintaining my license status that I effectuate the foregoing or equivalent amendments at the earliest moment.

Yours truly, Allen T. Simmons (Signed).

[fol. 289] EXHIBIT "B" TO AFFIDAVIT

Radio Station WAIM

Anderson, S. C.

Business Office

June 17, 1941.

Registered Mail

Mr. H. V. Akerberg, Vice-President,
Station Relations Department,
Columbia Broadcasting System, Inc.,
New York City.

DEAR MR. AKERBERG:

In reference to our Network affiliation contract between the Columbia Broadcasting System and Radio Station

WAIM which has been in effect since July 17, 1937, and on which there was recently exercised an extension option of six months by you, for the use of the facilities of broadcast station WAIM located at Anderson, South Carolina, we are assuming that this agreement will be continued and carried out on such a basis and in such a way as will fully comply with the chain broadcasting regulations promulgated by the Federal Communications Commission (F. C. C. Rules 3.101 to 3.108, inclusive) which, unless otherwise ordered, are to become effective on and after August 2, 1941.

If the effective date of the rules above referred to should be postponed, or if the rules mentioned should be amended or modified, then we assume that both you and we are to and will construe the agreement above mentioned in such a way as to comply with said rules.

So that our records may be complete in this connection, please acknowledge receipt of this communication at your earliest opportunity and oblige.

Cordially yours, (Signed) Wilton E. Hall, Owner.

Wilton E. Hall. CH.

[fol. 290] EXHIBIT "C" TO AFFIDAVIT

WRDW

"The Voice of Augusta"

Tenth & Broad Sts.

Augusta Broadcasting Company

Affiliated with Columbia
Broadcasting System, Inc.

Augusta, Georgia

June 25, 1941.

Mr. Stephen L. Fuld,
Columbia Broadcasting System,
485 Madison Avenue,
New York, N. Y.

DEAR STEVE:

I am writing to you with reference to the new Rules and Regulations of the FCC with regard to network affiliations

which will no doubt require that certain modifications be made in our present contract dated December 16, 1940 between the Columbia Broadcasting System and Augusta Broadcasting Company.

The effective date of these rules is, as you know, August 2, 1941 and up to this time no extension has been made. We are, of course, willing to accept and approve whatever contractual changes are necessary in order to conform with the requirements of the Federal Communications Commission and are most anxious that the necessary changes be made within the time limit designated by the Commission.

I have no doubt but that you are already working on this matter and that everything will be worked out in sufficient time.

Kindest personal regards.

Yours very truly, (Signed) Ray, W. R. Ringson.

WRR:jo.

[fol. 291] EXHIBIT "D" TO AFFIDAVIT

Radio Station KDAL Columbia Broadcasting System Affiliate Serving Duluth Minnesota—Superior Wisconsin and Surrounding Territory

Bradley Building

Duluth Minnesota

(CBS)

June 19, 1941.

Columbia Broadcasting System,
485 Madison Avenue,
New York, New York.

Attention: Mr. Mefford R. Runyan

GENTLEMEN:

This letter is with regard to the regulations of the Federal Communications Commission affecting chain broadcasting promulgated by the Commission May 2, 1941.

Pursuant to these regulations in their present form, we would be deprived of our opportunity to receive a renewal

of license of KDAL from the Commission if we persisted in the present contractual relationship with your company.

We have reviewed carefully our relationship with the Columbia Broadcasting System and we hope that we can continue our relations in the future if it is now possible to make some modifications in the contract which will permit us to comply with the requirements of the Commission.

We would, therefore, welcome an opportunity to meet with the appropriate persons in your organization to effectuate the necessary revisions of the contract.

Inasmuch as there are only ninety days from May 2, 1941 within which to comply with the Commission's requirements, we feel that arrangements for the revision of our contract should begin at once.

We would appreciate it, therefore, if we may be notified of a convenient time and place for such conference in order [fol. 292] that we may notify the Commission at the earliest possible date of our compliance with its regulations.

Red River Broadcasting Company, (Signed) by Dalton Le Masurier, President.

EXHIBIT "E" TO AFFIDAVIT

W E R C

"Erie's Radio Center"

Presque Isle Broadcasting Co.

C. B. S. Affiliate

Erie, Pennsylvania

June 9, 1941.

Columbia Broadcasting System, Inc.
485 Madison Avenue
New York City, New York

Attention: Stephen Fuld

GENTLEMEN:

We herewith tender you our notice of cancellation of our affiliation agreement to take effect August 2nd, 1941 in accordance with the new regulations of the Federal Communications Commission. However, we desire to negotiate a

new agreement in accordance with the new requirements of the Federal Communications Commission.

Very truly yours, Presque Isle Broadcasting Company, Radio Station WERC, (Signed) Charles E. Denny, General Manager.

CED:DC.

[fol. 293] EXHIBIT "F" TO AFFIDAVIT

KARM

The George Harm Station

1333 Van Ness

Fresno, California

Hattie Harm
President
Clyde F. Coombs
Vice President
and Manager

June 20, 1941.

Mr. Herbert V. Akerberg
Columbia Broadcasting System
485 Madison Avenue
New York, N. Y.

DEAR MR. AKERGERG:

In reference to our network affiliation agreement dated November 19, 1941 between KARM, The George Harm Station and the Columbia Broadcasting System, Inc., for the use of the facilities of Broadcast Station KARM, located at Fresno, California, we are assuming that this agreement will be continued and carried out on such a basis and in such a way as will fully comply with the chain broadcasting regulations promulgated by the Federal Communications Commission (F. C. C. Rules 3.101 to 3.108, inclusive) which, unless otherwise ordered, are to become effective on and after August 2, 1941.

If the effective date of the rules above referred to should be postponed, or if the rules mentioned should be amended or modified, then we assume that both you and we are to and will construe the agreement above mentioned in such a way as to comply with said rules.

[fol. 294] So that our records may be complete in this connection, please acknowledge receipt of this communication at your earliest possible opportunity.

Very truly yours, (Signed) Clyde F. Coombs, Vice President & Manager.

C:r.

EXHIBIT "G" TO AFFIDAVIT

5000 watts WKNE C.B.S.

Keene, N. H.

June 18, 1941.

Columbia Broadcasting System,
485 Madison Ave.,
New York, N. Y.

GENTLEMEN:

Pursuant to the Federal Communications Commission order dated May 2nd, 1941, in Docket No. 5060 in the matter of the investigation of chain broadcasting, we hereby serve notice of cancelation of our network contract with you to take effect August 2, 1941 or upon any extension thereof by the Commission.

However, we desire to continue our network affiliation and are ready to negotiate a new agreement which will conform to the FCC order referred to above.

Very truly yours, Twin State Broadcasting Corporation, (Signed) H. C. Wilder, President.

HCW:D.

[fol. 295] EXHIBIT "H" TO AFFIDAVIT

Scripps-Howard Radio, Inc.

Radio Station WNOX

Affiliated with

The Knoxville News-Sentinel

Knoxville, Tennessee

June 16, 1941.

Columbia Broadcasting System, Inc.
485 Madison Avenue,
New York, N. Y.

SIRS:

In the light of new regulations issued by the Federal Communications Commission concerning network-station agreements, dated May 2, 1941, we believe it will be necessary for us to meet and negotiate with you concerning changes which said regulations will require us to make in our agreement covering the affiliation of our Radio Station WNOX, Knoxville, Tennessee with your network.

Please advise us when an officer authorized to negotiate on behalf of our company may meet with you to discuss a new affiliation agreement which will enable our station to continue to operate as one of your affiliates and in compliance with all regulations of the Federal Communications Commission.

It will be necessary for us to reach a new agreement which will go into effect prior to the effective date of the new regulations of the Federal Communications Commission referred to above; or in the event of our failure to reach such a new agreement we hereby notify you of our intention to terminate our existing agreement as of the [fol. 296] close of business on the day immediately preceding the effective date of said regulations.

Very truly yours, Scripps-Howard Radio, Inc.,
(signed) By R. B. Westergaard, Vice President.
Columbia Broadcasting System.

EXHIBIT "I" TO AFFIDAVIT

KFAB KOIL KFOR

Central States

Broadcasting System

Omaha, Nebraska

N. Searle,
General Manager.

June 19, 1941.

Mr. Herb Akerberg,
Columbia Broadcasting System,
485 Madison Avenue,
New York, N. Y.

DEAR HERB:

We have three chain broadcasting contracts with your company which require consideration since the adoption on [fol. 297] May 2nd of the so-called monopoly regulations (3.101 to 3.108) by the F. C. C.

We had anticipated that before this some meeting or arrangement would be inaugurated by your company for the purpose of discussing these contracts. In view of the fact that the Commission has limited the time for the compliance with their regulations to August 2nd we are taking this means of suggesting an early consideration of the present contracts with a view to negotiating new contracts which will conform in all respects to the spirit and the letter of the F. C. C. regulations.

For your information, the three contracts that we refer to are; the Affiliation Agreement of April 25, 1938 with Central States Broadcasting Company for KOIL: the original agreement entered into January 7, 1932 by KFAB Broadcasting Company and Columbia Broadcasting System and subsequent letters, making the agreement under which KFAB and WBBM are now operating; and the agreement dated June 12, 1939 between Columbia Broadcasting System and KFAB Broadcasting Company. Each of these contracts, in our opinion, require separate consideration and a new working arrangement will have to be negotiated in each instance.

In view of the shortness of the time will you promptly advise us of your wishes so that we may get together. We will endeavor to meet with you at any reasonable time and place.

Very truly yours, (Signed) Don Searle, General Manager.

Don Searle/is.

[fol. 298] EXHIBIT "J" TO AFFIDAVIT

KGLO

The Mason City Globe-Gazette Station

Mason City, Iowa

June 19, 1941.

Mr. John G. Gude,
The Columbia Broadcasting System, Inc.,
485 Madison Avenue,
New York City, New York.

DEAR MR. GUDE:

On examination of Rules 3.101 to 3.108, inclusive, it appears that your present network contract with us will be illegal after July 31, 1941.

We, of course, desire to continue our network affiliations with CBS, but we cannot afford to do so at the expense of our license.

In view of these new regulations, I would appreciate having you submit for our approval a new agreement which will comply with the present rules.

Sincerely yours, (Signed) F. C. Eighmey, Lee P. Loomis, Secy. & Treas.

FCE:RS.

[fol. 299] EXHIBIT "K" TO AFFIDAVIT

An Affiliated Station of the Columbia Broadcasting System

WREC Broadcasting Service

"The Voice of Memphis"

Memphis, Tenn.

June 24, 1941.

Columbia Broadcasting System, Inc.,
485 Madison Avenue,
New York, N. Y.

Attention: Mr. H. V. Akerberg, V. P. Station Relations

GENTLEMEN:

In reference to the Agreement between Columbia Broadcasting System, Inc. and WREC, incorporated, dated December 13, 1933, as amended by letter agreements dated December 15, 1937 and June 6, 1939 and September 21, 1940, for the use of the facilities of Broadcast Station WREC at Memphis, Tennessee, we are assuming that this Agreement, and all extensions thereof, will be continued and carried out on such a basis and in such a way as will fully comply with the chain broadcasting regulations promulgated by the Federal Communications Commission (F. C. C. Rules 3.101 to 3.108, inclusive) which, unless otherwise ordered, are to become effective on and after August 2, 1941.

If the effective date of the rules above referred to should be postponed, or if the rules mentioned should be amended or modified, then we assume that both you and we are to and will construe the Agreement above mentioned in such a way as to comply with said rules.

[fol. 300] So that our records may be complete in this connection, please acknowledge receipt of this communication at your earliest possible opportunity.

Very truly yours, (Signed) Hoyt B. Wooten, WREC Broadcasting Service.

Hoyt B. Wooten:ga.

EXHIBIT "L" TO AFFIDAVIT

Miami Broadcasting Company

WQAM

Miami

Affiliated with Columbia Broadcasting System

June 24, 1941.

Columbia Broadcasting System, Inc.,
485 Madison Avenue,
New York, N. Y.

Attention: Mr. Herbert Akerberg, Vice President in Charge of Station Relations

DEAR MR. AKERBERG:

The Federal Communications Commission, on May 2, 1941, adopted an order in Docket No. 5060 which affects the existing contract between the Miami Broadcasting Company and the Columbia Broadcasting System. Pursuant to this [fol. 301] order, the Miami Broadcasting Company is herewith giving notice that it is canceling the existing contract between it and the Columbia Broadcasting System, effective on August 2, 1941, or on such other date as the Commission may designate as the effective date of the order. However, the Miami Broadcasting Company is desirous of continuing its affiliation with the Columbia Broadcasting System and receiving both commercial and sustaining programs from you. We are, therefore, prepared and willing to negotiate a new contract that will conform in every way with the new Rules and Regulations of the Federal Communications Commission and, at the same time, permit Station WQAM to continue its affiliation with Columbia.

A copy of this letter is being filed with the Federal Communications Commission.

Very truly yours, Miami Broadcasting Company,
(signed) F. W. Borton, President.

FWBet.

[fol. 302] EXHIBIT "M" TO AFFIDAVIT

Owned and Operated by KOMA Incorporated
Biltmore Hotel

KOMA

Oklahoma City's CBS Station

June 24, 1941.

Columbia Broadcasting System
485 Madison Avenue
New York, N. Y.

Re: F.C.C. Form 335, Supplement concerning Chain Broadcasting to Application for Standard Broadcasting Authorization

GENTLEMEN:

We have completed forms #335 and attached supplemental material and forwarded it to Spearman, Sykes & Roberson, Attorneys at Law, Munsey Building, Washington, D. C. to be filed with the Federal Communications Commission. In this connection we have furnished with those completed forms copies of our contract with the Columbia Broadcasting System and have set forth in letter of transmittal to the Columbia Broadcasting System and have set forth in letter of transmittal to the Federal Communications Commission in which we have made statement as follows:

"In view of the clause in our contact with the Columbia Broadcasting System which provided that the contract shall be subject to all applicable rules and regulations of the Federal Communications Commission, we construe our con-
[fol. 303] tractual relations with Columbia to have been modified so as to comply with the new network rules of the Commission to the extent that said contract may be inconsistent or in conflict with the provisibns of said rules."

Very truly yours, KOMA, Incorporated, (Signed) by Bryan Mathes.

BM*BJ.

EXHIBIT "N" TO AFFIDAVIT

Edgar L. Bill, President

Columbia Broadcasting System

"On The Air" Eighteen Hours Daily

Peoria Broadcasting Company

WMBD "from the Heart of Illinois"

Office and Studios, Alliance Life Building,

Peoria, Illinois

June 3, 1941.

Columbia Broadcasting System,
485 Madison Avenue
New York, N. Y.

DEAR FRIENDS:

We are at this time filling in F.C.C. Form #335 to supplement our application for renewal of license which is now [fol. 304] in the hands of the Commission. As you know, this form calls for information about our contract with you.

In view of the fact that our present contract with you would prohibit our getting a renewal of license according to the new F.C.C. regulations numbers 3.101, 3.102, 3.103, 3.104, 3.105, 3.106, 3.107 and 3.108, we are therefore notifying you that we desire to take advantage of Clause 9 in our contract with you, as of August 1, 1941.

It is our desire that we be released of all obligations in our present contract contrary to the new F.C.C. ruling as of August 1, 1941. You will please verify this letter in writing so that we can file copies of this letter and your answer with the Federal Communications Commission, along with Form #335.

Thank you.

Very truly yours, (Signed) Edgar L. Bill.

Edgar L. Bill. IK.

[fol. 305] EXHIBIT "O" TO AFFIDAVIT

The Agricultural Broadcasting Company

Burridge D. Butler, President. Glenn Snyder, Manager

Tel. Monroe 9700

WLS

Clear Channel—50,000 Watts—890 Kilocycles

Washington Blvd., Chicago

June 24, 1941.

Mr. J. G. Gude,
Columbia Broadcasting System,
485 Madison Avenue
New York, N. Y.

DEAR JAP:

Your office will receive shortly, if it has not already arrived there, a letter from KOY cancelling our CBS affiliation in accordance with the August 2nd dead-line, and offering to renegotiate to make our contract conform to any FCC orders, in case it does not already do so.

That letter was occasioned by the fact that, as you know, the Commission has ordered stations to file this new Form 335 where they have any pending application. We have an application pending in the Commission for 5 KW day. Loucks advised us that when we filed that form, we should file this letter simultaneously with it, in order that we wouldn't be held up by a further exchange of conversation on that subject.

I don't know that this formality, if it is that, is necessary, but he is handling the application and thought it advisable so we acted accordingly.

I wanted to write you this, so that when it came in, you would know what prompted it.

Yours very truly, (signed) Glenn.

GS*L.

[fol. 306] EXHIBIT "P" TO AFFIDAVIT

KTUL

Columbia Broadcasting System Affiliate

Tulsa Oklahoma

June 21, 1941.

Mr. Herbert V. Akerberg
Columbia Broadcasting System
New York City

DEAR MR. AKERBERG:

In view of Paragraph 9 in our agreement with the Columbia Broadcasting System, Inc., which provides that the contract shall be subject to all applicable rules and regulations, present and future, of the Federal Communications Commission, we construe our contractual relations with Columbia to have been modified so as to comply with the new network rules of the Commission to the extent that said contract may be inconsistent, or in conflict, with the provisions of said Rules.

Yours very truly, Tulsa Broadcasting Co., Inc.,
(Signed) Wm. C. Gillespie, Vice President & General Manager.

WCG:ss
Registered mail.

[fol. 307] EXHIBIT "Q" TO AFFIDAVIT

WIBX

"The Voice of the Mohawk Valley"

Columbia Broadcasting System Affiliate

Utica, New York

July 8, 1941.

Columbia Broadcasting System,
485 Madison Avenue,
New York, N. Y.

GENTLEMEN:

The Federal Communications Commission on May 2, 1941, adopted an order in Docket No. 5060 promulgating

certain regulations which have a direct bearing upon the present affiliation agreement between WIBX Incorporated (Station WIBX), Utica, New York, and your Company.

The purpose of this letter is to give you notice that on August 2, 1941, or on such other date as the Commission may fix as the effective date of its order, WIBX Incorporated will consider its affiliation contract with your Company as cancelled.

However, it is the desire of WIBX Incorporated to continue to receive both commercial and sustaining programs from the Columbia Broadcasting System after the effective date of the order, and we are now prepared and willing to enter into a new arrangement which will be consistent with the new regulations of the Commission.

We are filing a copy of this letter with the Commission along with Form No. 335 in order that it may be considered [fol. 308] in connection with our pending application for renewal of the Station license.

Respectfully yours, WIBX Incorporated, (signed) Elliott Stewart, Executive Vice President.

ES:MC.
Send by Registered Mail.

EXHIBIT "R" TO AFFIDAVIT

570 LC. 5,000 Watts Day, 1,000 Watts Night

WNAX

Affiliated with Columbia Broadcasting System

Broadcasting Company

Studios and Offices Also in Sioux City, Iowa

Yankton, South Dakota

June 12, 1941.

Columbia Broadcasting System
485 Madison Avenue
New York, New York

Attention: Mr. Mefford Runyon

GENTLEMEN:

You are, no doubt, familiar with the regulations of the Federal Communications Commission affecting chain broadcasting as promulgated by the Commission May 2, 1941.

[fol. 309] Under these regulations in their present form, we would be deprived of our opportunity to receive a renewal of license of WNAX from the Commission should we persist in the present contractual relationship with your company.

We have made a careful study of our relationship with Columbia and are hopeful that we can continue our present and satisfactory business relations in the future if it is now possible to make some modifications in the contract which will permit us fully to comply with the Commission's requirements.

We should like to meet with the appropriate persons in your organization for the purpose of effectuating the necessary revisions of the contract.

Since we have only ninety days, from May 2, 1941, to place ourselves on the basis of full compliance with the Commission's requirements, we feel that conferences looking toward the revision of our contract should commence at once.

We should, therefore, appreciate it if you will notify us of some convenient time and place for holding such conferences in order that we may, at the earliest opportunity, report to the Commission our compliance with its regulations.

Yours truly, WNAX Broadcasting Company, Luther L. Hill (signed), by Luther L. Hill, Vice-President.
LLH/lj.

[fol. 310] EXHIBIT "S" TO AFFIDAVIT

KSFO

The Associated Broadcasters, Inc.,

Palace Hotel, San Francisco, California

W. I. Dumm, President. June 28, 1941.

Columbia Broadcasting System, Inc., 485 Madison Avenue, New York, N. Y.

Attention: Mr. H. V. Akerberg, Vice Pres.

GENTLEMEN:

In reference to our network affiliation agreement dated June 26, 1936, between The Associated Broadcasters, Inc.,

and Columbia Broadcasting System, Inc., for the use of the facilities of Broadcast Station KSFO, located at San Francisco, California, we are assuming that this agreement will be continued and carried out on such a basis and in such a way as will fully comply with the chain broadcasting regulations promulgated by the Federal Communications Commission (F. C. C. Rules 3.101 to 3.108, inclusive) which, unless otherwise ordered, are to become effective on and after August 2, 1941.

If the effective date of the rules above referred to should be postponed, or if the rules mentioned should be amended or modified, then we will assume that both you and we are to and will construe the agreement above mentioned in such a way as to comply with said rules.

So that our records may be complete in this connection, please acknowledge receipt of this communication at your earliest possible opportunity.

Respectfully yours, (Signed) W. I. Dumm, President.

[fols. 311-315] EXHIBIT "T" TO AFFIDAVIT

WKBN Broadcasting Corporation, 17 North Champion Street, Youngstown, Ohio

Associated Station of The Columbia Broadcasting System

June 19, 1941.

Columbia Broadcasting System, 485 Madison Avenue, New York, N. Y.

Attention: Mr. J. G. Gude, Mgr., Station Relations Department

GENTLEMEN:

The Federal Communications Commission on May 2nd, 1941, adopted an order—Docket No. 5060, which order is effective on August 2nd, 1941, which affects the affiliation agreement between WKBN Broadcasting Corporation and the Columbia Broadcasting System.

Please take notice that, pursuant to this order, WKBN Broadcasting Corporation is cancelling its contract with Columbia—the cancellation to become effective on August 2nd, 1941, or on such other date as the Commission may determine to be the effective date of that part of the order which affects our relationship. However, we desire to continue as an affiliate of Columbia, and are now prepared and are willing to enter into a new or different arrangement with you which will be consistent in every way with the new order and regulations.

Please acknowledge receipt of this letter, a copy of which is being filed with the Commission.

Yours very truly, WKBN Broadcasting Corporation, W. P. Williamson, Jr. (signed), President. W. P. Williamson, Jr. W.

[fol. 316] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF KENNETH L. YOURD

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

KENNETH L. YOURD, being duly sworn, deposes and says:

1. I am an attorney employed by Columbia Broadcasting System, Inc. (hereinafter sometimes called "Columbia") in its Washington, D. C. office, and have been employed by Columbia since April, 1941. I am generally familiar with the Rules and Regulations of the Federal Communications Commission, and with its practice of issuing broacast station licenses.

2. On January 2, 1942 I inspected records of the Commission at its office in Washington, D. C. relating to the dates of expiration of the Standard Broadcast station licenses of the stations on the Columbia network. Such records showed

that the licenses of the following stations will expire on February 1, 1942:

[fol. 317]

WABC	New York	WLAW	Lawrence, Mass.
WKBW	Buffalo	WMAZ	Macon, Ga.
WBBM	Chicago	WCCO	Minneapolis-St. Paul
WCKY	Cincinnati		
WJR	Detroit	WLAC	Nashville
KFAB	Lincoln	WWL	New Orleans
WHAS	Louisville	KOMA	Oklahoma City
WCAU	Philadelphia	WRVA	Richmond
KMOX	St. Louis	KSL	Salt Lake City
WJSV	Washington	KWKH	Shreveport
WGPC	Albany, Ga.	KNX	Los Angeles
WBT	Charlotte	KQW	San Francisco-San Jose
KRLD	Dallas		
WHCU	Ithaca	KIRO	Seattle;
WNOX	Knoxville		

that the licenses of the following stations will expire on April 1, 1942:

WCAO	Baltimore	WTAD	Quincy, Ill.
WEEI	Boston	KTSA	San Antonio
WMT	Cedar Rapids	WGBI	Scranton
WPRO	Providence	WNAX	Sioux City-Yankton
WWNC	Asheville		
WCHS	Charleston, W. Va.	WSPA	Spartanburg, S. C.
KLZ	Denver	WDAE	Tampa
KROD	El Paso	WIBW	Topeka
WMMN	Fairmont, W. Va.	WMBS	Uniontown, Pa.
		KWFT	Wichita Falls, Tex.
WKZO	Kalamazoo		
WREC	Memphis	WKBN	Youngstown
WCOC	Meridian, Miss.	KFPY	Spokane
WQAM	Miami	KGMB	Honolulu
WDBO	Orlando	WKAQ	San Juan, Puerto Rico;
KOY	Phoenix		
WGAN	Portland, Me.		

that the licenses of the following stations will expire on June 1, 1942:

WHIO	Dayton	WJAS	Pittsburgh
WFBM	Indianapolis	KGGM	Albuquerque
KMBC	Kansas City	WDOD	Chattanooga
KOIL	Omaha	KVOR	Colo. Springs

[fol. 318]

KFBB	Great Falls, Mont.	KGVO	Missoula, Mont.
		WDBJ	Roanoke
KTRH	Houston	WTOC	Savannah
WKNE	Keene, N. H.	WSBT	South Bend
KGLO	Mason City, Iowa	WORC	Worcester
		KOIN	Portland, Ore.;
WISN	Milwaukee		

that the licenses of the following stations will expire on August 1, 1942:

WADC	Akron	WTAQ	Green Bay, Wis.
WOKO	Albany	WBIG	Greensboro, N. C.
WGAR	Cleveland		
WBNS	Columbus	KLRA	Little Rock
KRNT	Des Moines	WBRY	New Haven-Waterbury
WHP	Harrisburg		
WDRC	Hartford	WMBD	Peoria
WHEC	Rochester	KTUL	Tulsa
WFBL	Syracuse	KFH	Wichita;
WCSC	Charleston, S. C.		

that the licenses of the following stations will expire on October 1, 1942:

WAIM	Anderson, S. C.	KVSF	Santa Fe
WABI	Bangor	WIBX	Utica
WCAX	Burlington	WJNO	W. Palm Beach
WRBL	Columbus, Ga.	KARM	Fresno
WCOV	Montgomery	KROY	Sacramento
WFOY	St. Augustine	KHBC	Hilo, H. I.;

that the licenses of the following stations will expire on August 1, 1943:

WEOA	Evansville, Ind.	KTUC	Tucson
WMBR	Jacksonville	WKWK	Wheeling;

that the licenses of the following stations will expire on October 1, 1943:

WPAR	Parkersburg, W. Va.	WMAS	Springfield, Mass.;

[fol. 319] that the licenses of the following stations will expire on December 1, 1943:

WBAB	Atlantic City	KDAL	Duluth
WRDW	Augusta, Ga.	WDNC	Durham
WNBF	Binghamton	WERC	Erie;

and that the licenses of the following stations are issued on an indefinite, temporary basis:

WGST	Atlanta	WAPI	Birmingham.

3. On January 3, 1942 I obtained from the United States Department of Justice, in Washington, D. C., a copy of the complaint in a civil action in the District Court of the United States for the Northern District of Illinois, Eastern Division, entitled "United States of America, Plaintiff v. Columbia Broadcasting System, William S. Paley, Edward Klauber and Herbert V. Akerberg", a copy of which is hereto annexed, marked Exhibit A.

Kenneth L. Yourd.

Subscribed and sworn to before me this 5th day of January, 1942. George A. Burwell, Notary Public. N. Y. Co. Clk's No. 527, Reg. No. 3B800. Kings Co. Clk's No. 119, Reg. No. 3459. Bronx Co. Clk's No. 62, Reg. No. 248B43. Queens Co. Clk's No. 2167, Reg. No. 8330. Certificates filed in Westchester and Richmond Counties. Commission Expires March 30, 1943. (Seal.)

[fol. 320] EXHIBIT "A" TO AFFIDAVIT OF KENNETH L. YOURD

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. —

UNITED STATES OF AMERICA

v.

COLUMBIA BROADCASTING SYSTEM, WILLIAM S. PALEY, EDWARD KLAUBER, and HERBERT V. AKERBERG

Complaint

The United States of America, by J. Albert Woll, its attorney for the Northern District of Illinois, Thurman Arnold, Assistant Attorney General, and Victor O. Waters, Special Assistant to the Attorney General, acting under the direction of the Attorney General, files this complaint against the following named defendants and complains and alleges upon information and belief as follows:

I

Defendants

1. That the Columbia Broadcasting System, hereinafter referred to as CBS, a corporation organized and duly authorized to do business under the laws of the State of New York, is made a defendant herein;

[fol. 321] 2. That the following individuals, officers, or directors of the corporate defendant, are named as defendants herein; that they have during the period covered by this Complaint actively engaged in the management, direction and control of the affairs and policies of the corporate defendant and in particular those affairs and policies which are covered by this Complaint, and have authorized, ordered and done the acts of the defendants constituting the offenses hereinafter charged;

William S. Paley, President and member of the Board of Directors of CBS;

Edward Klauber, Executive Vice President and member of the Board of Directors of CBS;

Herbert V. Akerberg, Vice President of CBS;

II

Description of the Radio Broadcasting Industry

3. That a radio network system consists of two or more stations which broadcast the same program simultaneously, the program being transmitted to the stations comprising the network either from the station originating the program or from some other source over telephone wires usually leased from the American Telephone and Telegraph Company; that stations composing a network are often referred to as "affiliated" with a network and their relations with the network are usually covered by the terms of so-called "affiliation contracts" entered into separately by each of the stations with the network company; that a broadcasting station may be affiliated with more than one network and regardless of that affiliation may carry programs of other networks on a temporary or permanent basis by means of a wire line with such other network; that a network operation [fol. 322] may be national or regional in scope; that at the time of the filing of this Complaint there are in operation four national network systems in the United States; that two of said networks are operated by the National Broadcasting Company, hereinafter referred to as NBC, one by the Mutual Broadcasting System, hereinafter referred to as MBS, and one by CBS;

4. That programs transmitted by the networks to their affiliated stations are of two types, namely, "sustaining" or "commercial"; that "sustaining" programs are programs which are not sponsored or paid for by an advertiser, and include, among others, programs transmitted by the networks as a public service; that "commercial" programs are those which are sponsored and paid for, usually by an advertiser; that a broadcasting station affiliated with a national network is permitted to broadcast all of the network "sustaining" programs; that such station may broadcast a "commercial" program carried by the network only upon the consent of the sponsor or advertiser; that while a station affiliated with a network receives no revenue for broadcasting "sustaining" programs it is required to compensate the network whenever "sustaining" programs are carried where affiliation is with NBC or CBS; that stations affiliated with networks receive compensation only when they carry "commercial" programs;

5. That the nature of the radio spectrum is such that the number of broadcasting stations which can operate, the power which they can utilize, the number and character of broadcasting stations available for participation in network broadcasting, and the facilities available for licensing are limited;

6. That an advertiser using the facilities of a nationwide radio network is interested in securing the widest possible circulation and the greatest number of listeners; that the circulation of an individual station participating in a network program depends on its geographic location, the [fol. 323] power under which the station is authorized to operate, the frequency assigned to it, and its hours of operation; that the power employed by a broadcasting station determines the strength of its signal and affects the scope of the area it can serve; that the lower the frequency assigned the farther the station's signal will carry and the larger the area served;

7. That there are more than 800 commercial radio broadcasting stations in the United States which are operated under the authority of the Federal Communications Commission (hereinafter referred to as the FCC) pursuant to the Act of Congress known as the Communications Act of 1934, approved June 19, 1934, and prior acts of Congress; that in many cities and towns of the United States there are less than four broadcasting stations having comparable facilities; that in such cities and towns it is impossible for the four existing networks or for potential networks to secure affiliated station outlets where such available stations are controlled exclusively by existing networks; that 105 cities and towns in the United States, each having a population in excess of 50,000 have three or less full-time commercial stations in each (list attached hereto as Exhibit A and made a part hereof);

8. That radio advertisers in whose behalf commercial radio programs are produced are of three types, namely, national advertisers using national network facilities, national advertisers using electrical transcriptions, and local advertisers sponsoring programs over local stations either through the medium of performance by live talent or through the reproduction of programs recorded upon electrical transcriptions; that a national advertiser may contract for the

use of a station's time either by entering into contractual arrangements with the network with which the station is affiliated or by contracting directly with the several stations affiliated with the network; that the program of the national [fol. 324] advertiser, using network facilities, must be produced through the performance of live talent present in the studio of the station originating the network broadcast; that the program of a national advertiser who does not use network facilities is usually produced by the reproduction of programs recorded upon electrical transcriptions; that electrical transcriptions are mechanical devices upon which programs are recorded or mechanically reproduced for the exclusive use of radio broadcasting stations;

III

Position of Defendants in the Radio Broadcasting Industry

9. That CBS has for its key station WABC in the City and State of New York; that CBS is composed of radio stations which comprise the "basic" network and others which are known as "supplemental" affiliations; that the CBS "basic" network is composed of 28 stations, either licensed to or affiliated with CBS; that there are in addition thereto more than 93 stations affiliated with CBS which are supplemental to the CBS "basic" network and are available at the option of the advertiser;

10. That of 52 existing clear channel radio stations in the United States CBS owns, controls or has affiliated with it 18, and NBC 32; that most of the full-time regional stations are likewise affiliated with either CBS or NBC; that excluding low-powered local stations, more than half of all the stations in the country are affiliated with CBS and NBC; that of the 92 cities in the United States with more than 100,000 population, less than 63 have three or more full-time stations and less than 37 have four or more full-time stations; that there are more than 45 cities in the United States with a population in excess of 50,000 served by CBS [fol. 325] or NBC or both, in which no other network can procure an independent full-time broadcasting station outlet because of the control exerted by CBS and NBC; that in over 20 cities of the United States, including Cleveland, Indianapolis, Houston, Birmingham, Providence, Des Moines, Albany, Charlotte and Harrisburg, other networks

can procure only limited access to the existent radio broadcasting facilities;

11. That CBS is the direct operator and licensee, under licenses issued by the FCC, of the following broadcasting stations, having the call letters, power, and locations set out below:

Call Letters	Location	Power
WABC	New York	50,000 Watts
WJSV	Washington	50,000 "
WBT	Charlotte, N. C.	50,000 "
WEEI	Boston	5,000 "
WBBM	Chicago	50,000 "
WCCO	Minneapolis	50,000 "
KMOX	St. Louis	50,000 "
KNX	Los Angeles	50,000 "

12. That for the years 1938, 1939 and 1940, the net time sales for the entire radio industry were $117,379,456; $129,968,026, and $154,823,787, respectively, as compared with $25,450,351, $30,961,499 and $35,630,063 for CBS; $35,611,145, $37,747,543 and $41,683,341 for NBC; and $2,272,662, $2,610,969 and $3,600,161 for MBS;

13. That the power and dominant position of NBC and CBS are further shown by comparing the net operating income for the entire broadcasting industry with that of NBC and CBS; that for the years 1938, 1939 and 1940, the net operating income for the entire broadcasting industry was $18,854,784, $23,837,944 and $33,296,708 respectively, as compared with $4,329,510, $6,128,686, and $7,431,634 for CBS; and $4,137,503, $4,103,909, and $5,834,772 for NBC;

[fol. 326] 14. That the relative positions of CBS and NBC in the radio industry are apparent from the fact that in each of the years mentioned CBS and NBC have each enjoyed net profits in excess of the gross revenues of their only competitor in national network operations;

15. That stations affiliated with CBS and NBC have over 85% of the total combined night-time power of all stations in the United States; that by reason of the dominant position in the industry of CBS and NBC and because of the large volume of business controlled by them and the many ad-

vantages afforded radio stations through affiliation with them a network affiliation or a continued network affiliation with either CBS or NBC is desired by practically all commercial radio broadcasting stations; that CBS and NBC have exercised the power inherent in their dominant position by imposing upon their respective affiliated broadcasting stations certain identical tying clauses which have prevented such stations from dealing with other competing network systems and have prevented CBS and NBC from dealing with radio stations other than their regular network affiliated stations; that both CBS and NBC have optioned all, or a part, of their respective affiliated stations' time on the air, a substantial portion of which is never used by either network; that NBC, as well as CBS, has entered into contracts of several years' duration with each of its affiliated stations, and is the owner, operator and licensee of radio stations located in lucrative marketing areas;

IV

Jurisdiction and Venue

16. That this Complaint is filed and the jurisdiction of this Court invoked to obtain equitable relief against de- [fol. 327] fendant Columbia Broadcasting System and certain of the officers and members of the Boards of Directors thereof, because of their violations, jointly and severally, as hereinafter alleged, of Sections 1 and 2 of the Sherman Act;

17. That the unlawful combination and conspiracy hereinafter described to restrain commerce among the several states of the United States has been carried on in part within the Northern District of Illinois, Eastern Division, and many of the unlawful acts pursuant thereto have been performed by defendants and their representatives in said District; that the interstate commerce in radio broadcasting and electrical transcriptions, as hereinafter described, is carried on in part within said District; that said corporate defendant has a usual place of business in said District and there transacts business and is within the jurisdiction of this Court for the purpose of service;

V

Interstate Commerce

a. Radio Broadcasting

18. That radio broadcasting stations, including network broadcasting systems in the United States, are engaged in commerce among the several states of the United States, the District of Columbia, and within the Northern District of Illinois, Eastern Division; that each station is an instrumentality through which energy, ideas and entertainment are transmitted across state or national boundaries to radio listeners in the United States, the District of Columbia, and foreign countries;

[fol. 328] b. Electrical Transcriptions

19. That more than 50% of the electrical transcriptions produced in the United States for the exclusive use of radio broadcasting is produced or manufactured in the States of New York and California and shipped to radio broadcasting stations located throughout the United States, the District of Columbia, and within the Northern District of Illinois, Eastern Division; that a substantial portion of the time devoted to radio broadcasting by radio broadcasting stations is consumed by the broadcasting of intelligence, entertainment and information recorded upon electrical transcriptions;

VI

The Combination and Conspiracy

20. That the defendants named herein, together with affiliated broadcasting stations, each well knowing of the matters and things hereinbefore alleged, for many years preceding the filing of this Complaint and continuing to the date of the filing hereof, have been engaged in the United States, and within the Northern District of Illinois, Eastern Division, in a wrongful and unlawful combination and conspiracy in restraint of the aforesaid interstate commerce and in a wrongful and unlawful combination and conspiracy to attempt to monopolize the aforesaid interstate commerce in radio broadcasting in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and

Monopolies" (15 U. S. C. A. 1 and 2), and have conspired to do all acts and things and to use all means necessary and appropriate to make said restraints effective, including the means, acts and things hereinafter more particularly alleged;

[fol. 329] 21. That one of the purposes of the conspiracy was to procure, monopolize and keep within the control of the defendants herein, to the greatest extent possible and to the exclusion of other persons and corporations, the business of conducting national radio network operations and to suppress competition in all phases of such operations, including competition in securing national radio advertisers; that as a part of said combination and conspiracy the defendants have arranged and agreed among themselves to do and have done the following things:

(a) To require radio stations affiliated with CBS to execute affiliation contracts containing clauses which by their terms have forbidden said broadcasting stations from accepting any programs from any other national network (a typical copy of such contract clause is attached hereto, as "Exhibit B" and made a part hereof);

(b) To refuse to furnish CBS network programs to radio stations not regularly affiliated with CBS even though the regularly affiliated station covering substantially the same area is not broadcasting such programs, thereby preventing many radio listeners from hearing and enjoying CBS network programs that would otherwise be available;

(c) To require radio stations affiliated with CBS to execute affiliation contracts containing so-called option time clauses. Those clauses usually provide that upon 28 days' notice the network may exercise the option to use any part of the affiliated stations' time on the air as the network may desire. Typical option time clauses are attached hereto marked "Exhibits C and D" and made a part hereof;

(d) To suppress competition among radio networks in the sale to advertisers of time on the air by optioning all of the more desirable time of affiliated stations, which options may be exercised upon 28 days' notice. The value of a program to a radio advertiser depends largely on its continua-
[fol. 330] tion for such period of time as to familiarize the listening public with the program, the local station over

which it is broadcast, and the time of the broadcast. The necessary effect, therefore, of such option time contracts has been to prevent any other network from competing with CBS in the furnishing of network programs, or in arranging network broadcasts on behalf of network advertisers to such stations during the stations' time on the air optioned to CBS, even though a substantial portion of the affiliated stations' time optioned to CBS has not been purchased by CBS for the broadcasting of commercial programs;

(e) To suppress competition between CBS and its affiliated radio stations in securing commercial radio advertisers through CBS's practice of optioning of its affiliated stations' time on the air, thereby vesting in CBS rather than in the affiliated stations, the power to make satisfactory commitments with radio advertisers as to the desired portion of the station's time on the air;

(f) To prevent affiliated stations from entering into any commitments with local radio sponsors or advertisers for the more desirable hours for periods longer than 28 days, even though CBS does not exercise its option to use such time;

(g) To suppress competition between CBS and electrical transcription manufacturers in securing commercial radio advertisers for stations affiliated with CBS through exercise by CBS of its option on the affiliated stations' time on the air in such manner as to prevent electrical transcription manufacturers or advertisers desiring to use electrical transcriptions for broadcasting purposes from securing satisfactory commitments as to desired radio time and as to geographic distribution directly with the radio stations affiliated with CBS;

(h) To suppress competition with other network systems in securing network station outlets by requiring affiliated [fol. 331] stations to execute long term contracts. The FCC issues licenses for station operation for periods not longer than two years. The affiliation contracts between CBS and its affiliated stations are for periods of five years or more. The stations affiliated with CBS have been forced to sign these long term contracts because of the dominate position in the broadcasting industry enjoyed by CBS, and because NBC, its chief competitor, forces its affiliated stations to sign similar long term contracts.

(i) To suppress the development of existing and potential radio network systems, by entering into the aforesaid "tying" affiliation contracts with stations located in substantially all of the more lucrative marketing areas where the number of radio broadcasting stations available for network systems is limited, well knowing that their major competitor, NBC, is pursuing a similar policy;

(j) To acquire complete ownership and control of radio stations located in certain cities and towns in which the number of broadcasting stations having comparable radio facilities is insufficient to permit other national network operations to use exclusively the facilities of one of such stations;

VII

Effect of Conspiracy

22. That the defendants have adopted the means and engaged in the activities aforesaid, with the intent, purpose, and effect of unreasonably and unlawfully suppressing competition in the conduct and development of national radio network systems, and have otherwise unreasonably restrained commerce in radio broadcasting and electrical transcriptions; that their activities aforesaid have pre- [fol. 332] vented unknown thousands of radio listeners from hearing and enjoying radio network programs that otherwise would have been available and have affected the quality of radio network programs which could be expected to flow from a competitive radio broadcasting industry;

23. That the radio stations affiliated with defendants in the operation of national networks have substantial investments of money, credits and property in their businesses and said investments and businesses would be greatly reduced in value or destroyed if defendants, because of their dominant position in the industry, refused to allow such stations to continue a network affiliation;

24. That the power of defendants, the competitive advantages enjoyed by them, the unreasonable restraints of interstate commerce inherent in the ownership and operation of a national network system and of radio stations located in cities and towns in which there are less than four radio stations with comparable facilities are such that they are subject to abuses which can be corrected only by a severance of these ownerships and controls.

VIII

Prayer

Wherefore, the complainant prays:

1. That summons issue to each of the defendants, commanding said defendants to appear herein and to answer the allegations contained in this Complaint and to abide by and perform such orders and decrees as the Court may make in the premises;

[fol. 333] 2. That upon final hearing of this cause, the Court order, adjudge and decree that the conspiracy and wrongs herein described exist and constitute an unreasonable restraint of trade and commerce among the various states and the District of Columbia;

3. That a receiver be appointed to receive forthwith any stock and share capital owned by Columbia Broadcasting System or any officers thereof, which represents the ownership of radio stations located in cities and towns in which there are less than four radio stations with comparable facilities, and that defendants be thereupon ordered forthwith to transfer the aforesaid stock and share capital to the aforesaid receiver; that the aforesaid receiver upon receiving the aforesaid stock and share capital offer such operations for sale and sell the same, holding the proceeds subject to the order of the Court; that in the event there is no stock and share capital of a severable nature representing ownership of the above named radio stations, the Court require defendants to sever their ownership, operation and control of said radio stations and otherwise enjoin the operation of same by defendants in such manner and form as the Court shall deem just and proper;

4. That the defendants and each and all of their respective officers, managers, agents, employees, and all persons acting or claim to act on behalf of defendants be enjoined and restrained from entering into any contract, agreement, conspiracy, or otherwise to do the following acts and things:

(a) To exercise any right or power to prevent affiliated radio stations from accepting any program from any other network during such stations' time on the air which is not being used by defendants;

(b) To refuse to furnish CBS network programs to radio stations covering substantially the same area as the regu-[fol. 334] larly affiliated stations, in a non-discriminatory manner, when the regularly affiliated station does not broadcast such programs;

(c) To prevent or hinder the affiliated stations from scheduling programs before the defendants finally agree to use the time during which such programs are scheduled, or from requiring the station to clear time already scheduled for use, either through the medium of live talent or electrical transcriptions, when the defendants seek to use the time;

(d) To enter into or assert any contract of affiliation with any radio station for a period longer than two years;

5. That the complainant recover the costs and disbursements of this suit;

6. That the complainant shall have such other and further relief as the Court shall deem just and proper.

Victor O. Waters, Special Assistant to the Attorney General. —— ——, Attorney General. —— ——, Assistant Attorney General. —— ——, United States Attorney.

[fol. 335] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No.

UNITED STATES OF AMERICA

v.

COLUMBIA BROADCASTING SYSTEM, WILLIAM S. PALEY, EDWARD KLAUBER and HERBERT V. AKERBERG

Affidavit

VICTOR O. WATERS, being duly sworn, says:

I am a Special Assistant to the Attorney General and have been actively engaged in the conduct of the investigation and other work on behalf of the complainant in connec-

tion with this proceeding. I have read the Complaint herein and know the contents thereof and am informed and verily believe the allegations therein to be true. The sources of my information and the grounds of my belief are the statements and correspondence of various officials of radio broadcasting stations, radio network systems and manufacturers of electrical transcription records; the statements and official reports of Government investigators, records and evidence assembled by the Federal Communications Commission, and correspondence, memoranda, statements and agreements of the defendants.

Victor O. Waters, Special Assistant to the Attorney General.

Subscribed and sworn to before me this — day of —, 19—. —— ——, Notary Public, District of Columbia.

[fol. 336] EXHIBIT "A" TO COMPLAINT

Summary of Metropolitan Districts in the United States Having a Population in Excess of 50,000, Having Three or Less Full-Time Commercial Stations and Showing the Population and Total Number of Full-Time Commercial Stations in Each

Three full-time commercial stations

Metropolitan District	Population	Total number of full-time commercial stations
Cleveland, O.	1,214,943	3
Milwaukee, Wis.	790,336	3
Houston, Tex.	510,397	3
Rochester, N. Y.	411,970	3
Birmingham, Ala.	407,851	3
Youngstown, O.	372,428	3
Akron, O.	349,705	3
Worcester, Mass.	306,194	3
Omaha-Council Bluffs, Nebr.-Ia.	287,698	3
San Diego, Cal.	256,368	3
Miami, Fla.	250,537	3
Richmond, Va.	245,674	3
Nashville, Tenn.	241,769	3
Salt Lake City, Utah	204,488	3

Metropolitan District	Population	Total number of full-time commercial stations
Jacksonville, Fla.	195,619	3
Chattanooga, Tenn.	193,215	3
Tulsa, Okla.	188,562	3
Des Moines, Ia.	183,973	3
Duluth-Superior, Minn.-Wis.	157,098	3
Knoxville, Tenn.	151,829	3
Beaumont-Port Arthur, Tex.	138,608	3
Wichita, Kans.	127,308	3
Little Rock, Ark.	126,724	3
Phoenix, Ariz.	121,828	3
Shreveport, La.	112,225	3
Springfield, Mo.	70,514	3
[fol. 337] Two full-time commercial stations		
Columbus, O.	365,796	2
Toledo, O.	341,663	2
Lowell-Lawrence-Haverhill, Mass.	334,969	2
Allentown-Bethlehem-Easton, Pa.	325,142	2
Norfolk-Portsmouth-Newport News, Va.	323,326	2
Fall River-New Bedford, Mass.	272,648	2
Dayton, O.	271,513	2
Bridgeport, Conn.	216,621	2
Grand Rapids, Mich.	209,873	2
Wheeling, W. Va.	196,340	2
Wilmington, Del.	188,974	2
Davenport-Rock Island-Moline, Ia.-Ill.	174,995	2
Harrisburg, Pa.	173,367	2
Huntington-Ashland, W. Va.-Ky.	170,979	2
Sacramento, Cal	158,999	2
Waterbury, Conn.	144,822	2
Evansville, Ind.	141,614	2
Charleston, W. Va.	136,332	2
Fort Wayne, Ind.	134,385	2
Erie, Pa.	134,039	2
Savannah, Ga.	117,970	2
El Paso, Tex.	115,801	2
Mobile, Ala.	114,906	2
Charlotte, N. C.	112,986	2
Roanoke, Va.	110,593	2

Metropolitan District	Population	Total number of full-time commercial stations
Winston-Salem, N. C.	109,833	2
Portland, Me.	106,566	2
Atlantic City, N. J.	100,096	2
Charleston, S. C.	98,711	2
Fresno, Cal.	97,504	2
Montgomery, Ala.	93,697	2
Columbia, S. C.	89,555	2
Springfield, Ill.	89,484	2
Lincoln, Nebr.	88,191	2
Jackson, Miss.	88,003	2

[fol. 338]

Augusta, Ga.	87,809	2
Sioux City, Ia.	87,791	2
Manchester, N. H.	81,932	2
Asheville, N. C.	76,324	2
Macon, Ga.	74,830	2
Corpus Christi, Tex.	70,677	2
Amarillo, Tex.	53,463	2
One full-time commercial station		
New Haven, Conn.	308,228	1
Canton, O.	200,352	1
Trenton, N. J.	200,128	1
Utica-Rome, N. Y.	197,128	1
Flint, Mich.	188,554	1
Reading, Pa.	175,355	1
Peoria, Ill.	162,566	1
Saginaw-Bay City, Mich.	153,388	1
Johnstown, Pa.	151,781	1
South Bend, Ind.	147,022	1
Binghamton, N. Y.	145,156	1
Racine-Kenosha, Wis.	135,075	1
Lancaster, Pa.	132,037	1
San Jose, Cal.	129,367	1
Altoona, Pa.	114,094	1
Lansing, Mich.	110,356	1
Austin, Tex.	106,193	1
Rockford, Ill.	105,259	1
York, Pa.	92,627	1
Columbus, Ga.	92,478	1

Metropolitan District	Population	Total number of full-time commercial stations
St. Joseph, Mo.	86,991	1
Berkeley, Cal.	85,547	1
Terre Haute, Ind.	83,370	1
Stockton, Cal.	79,337	1
Madison, Wis.	78,349	1
Topeka, Kans.	77,749	1
Springfield, O.	77,406	1
Kalamazoo, Mich.	77,213	1
[fol. 339]		
Cedar Rapids, Ia.	73,219	1
Greensboro, N. C.	73,055	1
Galveston, Tex.	71,677	1
Waco, Tex.	71,114	1
Durham, N. C.	69,683	1
Decatur, Ill.	65,764	1
Pueblo, Colo.	62,039	1
No full-time commercial stations		
Hamilton-Middletown, O.	112,686	0
Waterloo, Ia.	67,050	0

[fol. 340] EXHIBIT "B" TO COMPLAINT

Typical Exclusive Clause Preventing Station From Using Other Networks

"It is agreed that during the term of this contract the station will not, without the specific consent in writing of Columbia, permit the use of its facilities by any other broadcasting chain or network; that without such consent it will not receive programs from or forward programs to any other station, group of stations, chain, or network; and that without such consent it will not, directly or indirectly, through an agency, representative, or otherwise, sell its facilities for use along with the facilities of any other station or stations as a group."

[fol. 341] EXHIBITS "C" AND "D" TO COMPLAINT

Typical Option Time Clauses of CBS

"The Station agrees to furnish the facilities of its station to Columbia for all commercial programs and undertakes to accept and broadcast all such commercial programs offered to it by Columbia, at whatever day or hour, during the time when the Station is licensed to operate."

"The Station will broadcast all network sponsored programs furnished to it by Columbia during the time when the Station is licensed to operate; provided, however, that except in connection with occasional sponsored programs of special events (such as World Series broadcasts) during periods of not more than two weeks each, the Station need not in any week broadcast network sponsored programs totaling more than fifty 'converted hours' (as defined below, but for this purpose computed during the entire term of this agreement on the basis of the difference in rates at different hours specified in Columbia's Rate Card No. 23."( )

( ) A "converted hour" is defined in the contract as follows:

"A 'converted hour' means an aggregate period of one hour during which there shall be broadcast over the Station one or more network sponsored programs for which Columbia shall charge its full night-time card rate for the station. An aggregate period of one hour during which there shall be broadcast over the Station one or more network sponsored programs for which Columbia shall charge a fraction of its night-time card rate, such as its daytime card rate, shall be the equivalent of the same fraction of a 'converted hour'. Fractions of an hour shall for all purposes be treated as their fractional proportions of full hours at the same time of the day."

[fol. 342] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF HERBERT V. AKERBERG

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

HERBERT V. AKERBERG, being duly sworn, deposes and says:

1. I am a Vice-President of Columbia Broadcasting System, Inc. (hereinafter called "Columbia") in charge of station relations, and have been employed in this capacity since 1936. From 1933 to 1936 I was General Manager of this department and my duties were substantially what they are now. I have been employed by Columbia since 1929. I have heretofore made an affidavit in support of Columbia's Motion for Preliminary Injunction herein, said affidavit having been verified October 29, 1941.

2. The payments by Columbia to its affiliated stations (excluding stations owned or leased by Columbia) as com- [fol. 343] pensation for the broadcasting of network commercial programs during the accounting years 1931 through 1940 and during the first 10 months of 1941 have represented, with the exception of the year 1938, ever-increasing percentages of the amounts received by Columbia from advertisers and advertising agencies (after deducting applicable discounts and agency commission) for the broadcasting of network commercial programs over such stations. The trend of the percentage of the amounts so received by Columbia paid to affiliated stations is shown in the table below in which the percentage for 1931 is expressed as 100:

1931	100
1932	127
1933	142
1934	171
1935	185
1936	192
1937	197
1938	181
1939	201
1940	211
1941 (10 months)	222

The foregoing index figures have been computed without giving effect to payments made by some stations to the network on account of the expense of connecting the station to the network. As these payments were greater, both in the aggregate and proportionately, in 1931 than in 1940 or 1941, adjustment of the figures above to reflect deduction of such wire cost from the amount of station compensation would result in showing an even sharper rate of increase in the stations' share of network revenues.

3. As of the date of this affidavit, 113 stations (exclusive of the eight operated by Columbia) are affiliated with the Columbia network. Contracts with 106 of such stations provide for a term (either in the original contract or a subse-[fol. 344] quent modification) in excess of two years. As used in this affidavit the "term" of an affiliation agreement means the original term of such agreement (whether or not such term may be shortened, or might have been shortened, by Columbia by exercise of a right of cancellation) plus the aggregate of all renewal periods, if any, by which the term of the contract may be extended, or might have been extended, at the option of Columbia.

4. The provision of the form of contract set forth in Exhibit A to the complaint, giving Columbia an option to terminate on twelve months' notice, has been omitted from the contracts for 44 of the 106 stations whose contracts provide for a term in excess of two years. With three exceptions noted below, the contracts for such 44 stations give no right of cancellation by Columbia, other than the usual right specified in the contracts to cancel on 60 days' notice if, as a result of a change in the power, frequency, time or manner of operation of the station, the value of the station as an outlet for Columbia network programs is substantially lessened. The contracts for such 44 stations contain no provision giving Columbia an option to extend the original term of such contracts.

One of such contracts provides that Columbia may terminate if station WABC operates with 500,000 watts. Another provides that Columbia may terminate if Columbia has an opportunity to affiliate with a 50,000 watt station in the area served by the station to which the contract refers. A third contract provides that Columbia may terminate if Columbia has an opportunity to affiliate with a 50,000 watt station is a designated area; such right of cancellation may

not be exercised, however, if the station to which the contract refers is itself licensed to operate and is operating with 50,000 watts within a designated time.

Of the contracts for the 44 stations above referred to from which the provision for termination on twelve [fol. 345] months' notice has been omitted, those for 26 stations are for a term of five years or more and were made for the five year, or longer, term at the specific request of the respective stations. Nine of such stations requested a five year or longer affiliation contract because they had an opportunity to increase their power or improve their plants, or both, and were unwilling to make the large capital expenditure involved without assurance that they would receive Columbia network sustaining and commercial programs for a period of years. Seventeen of such stations requested the five year or longer affiliation contract because they believed that the assurance that they would receive Columbia network sustaining and commercial programs for a period of years would contribute to stability of station operations. The contract for one of these stations which is for a term in excess of five years, but which may be terminated by Columbia in the event that the station is not operating with 50,000 watts on the frequency specified in the contract within the time limit specified by Columbia, becomes non-cancellable when the station is so operating and was made for the long term at the request of the station so that it would be assured of Columbia network sustaining and commercial programs for a period of years in the event that the station is able to begin operating with 50,000 watts during the specified time limit.

5. One of the purposes of my prior affidavit above referred to was to show that because of the order complained of Columbia has received letters from numerous of its affiliates (copies of many of which are annexed to said affidavit as exhibits) cancelling or repudiating, or threatening to cancel or to refuse to perform, their affiliation contracts.

On October 31, 1941, William S. Paley, President of Columbia, sent to each Columbia affiliate a wire, a copy of which is annexed hereto as Exhibit A, informing affiliates that on the day before Columbia had filed a bill in equity [fol. 346] in the Federal Court seeking to enjoin the Federal Communications Commission from putting into effect the regulations promulgated by the order complained of.

On October 31, 1941, the Commission issued its so-called "Minute" (a copy of which is Appendix D to Government's brief) which purported to assure affiliates that if they wished to contest the validity of the regulations in proceedings before the Commission they would be allowed to remain on the air pending the proceedings and any appeal. On November 6, 1941 Edward Klauber, Executive Vice President of Columbia, sent to each Columbia affiliate a letter, a copy of which is annexed hereto as Exhibit B, together with a copy of a public statement made by Columbia, a copy of the complaint, and a copy of the affidavit of Mr. Paley herein, sworn to October 30, 1941. The public statement stated, among other things, that Columbia had moved in the Federal Court to prevent the Federal Communications Commission from putting its new regulations into effect on November 15th and that "The relief sought by Columbia is a court order which would suspend the new rules pending a trial of the issues before a three-judge statutory court". On November 12, 1941 I sent to each Columbia affiliate a telegram, a copy of which is annexed hereto as Exhibit C, informing affiliates that by court order in conformity with a stipulation between counsel the regulations had been suspended in their entirety until after the hearing and decision of Columbia's motion.

Since the issue on October 31, 1941 of the Commission's Minute referred to above, Columbia has continued to receive indications that its affiliates would cancel, repudiate or refuse to perform their affiliation contracts and refuse to renew such contracts, and Columbia has received no indication that the Minute has had or will have the effect of inducing stations to assume the burden of themselves testing the validity of the regulations in hearings before the Commission and subsequent appeals. In fact, since the issue [fol. 347] of the Minute Columbia has received from five affiliates letters cancelling or repudiating affiliation contracts or indicating an intention not to continue to be bound thereby. Copies of these letters are annexed hereto as Exhibits D, E, F, G and H. I believe that Columbia would have received more letters of this sort since October 31, 1941 had it not been for the circulation by Columbia, in the telegrams and letter referred to above, of information of the pendency of Columbia's suit and motion for preliminary injunction, and the stipulation and order suspending the regulations pending hearing and decision thereon.

After the making of the order of November 12, 1941, Columbia resumed the negotiations with stations for renewal of their affiliation contracts, which negotiations had been terminated as a result of the Commission's regulations as stated at pages 3 and 4 of my affidavit of October 29, 1941, and renewals of several of such contracts have been obtained on substantially the same terms as provided in the old contracts.

Herbert V. Akerberg.

Subscribed and sworn to before me this 5th day of January, 1942. George A. Burwell, Notary Public. N. Y. Co. Clk's No. 527, Reg. No. 3B800; Kings Co. Clk's No. 119, Reg. No. 3459; Bronx Co. Clk's No. 62, Reg. No. 248B43; Queens Co. Clk's No. 2167, Reg. No. 8330; Certificates filed in Westchester and Richmond Counties. Commission expires March 30, 1943. (Seal.)

[fol. 348] EXHIBIT "A" TO AFFIDAVIT OF HERBERT V. AKERBERG

October 31, 1941

To the affiliates of the Columbia Broadcasting System, Inc.:

Yesterday, Columbia in a bill of Equity filed in the Federal Court, asked that the Federal Communications Commission be enjoined from putting into effect the new chain broadcasting rules. Columbia stated that the action of the Commission was arbitrary and without any basis in law, and would be destructive to the American broadcasting industry.

Columbia has insisted ever since the rules were first promulgated, that the exercise of vague and ill-defined powers by the Commission would have a very intimidating effect on the industry, and that such powers would act as a direct threat to freedom of the air.

Columbia will prosecute the suit vigorously and, at the same time, continue its efforts for the enactment of a new radio law which will recognize the present status of the radio art and the important part networks now play in American broadcasting; also a law which will clearly spec-

ify the powers of the Commission and thus safeguard the interests of broadcasters and the public alike.

We feel that this court proceeding is not only for Columbia's best interests, but also for the protection of every broadcaster in America and the great listening public.

We will keep you informed of further developments.

William S. Paley.

[fol. 349] EXHIBIT "B" TO AFFIDAVIT OF HERBERT V. AKERBERG

Columbia Broadcasting System, Inc.

485 Madison Avenue

New York

Office of The Executive Vice President, Edward Klauber

November 6, 1941

Supplementing Mr. Paley's telegram to you of October 31, I am sending you herewith a copy of the public statement made by us when we went into the Federal Court in an effort to enjoin the FCC from enforcing its regulations and for your fuller information, a copy of our complaint and of an affidavit by Mr. Paley filed therewith.

Sincerely yours, Edward Klauber.

[fol. 350] EXHIBIT "C" TO AFFIDAVIT OF HERBERT V. AKERBERG

Copy

Columbia Broadcasting System, Inc.

Private Wire

Date November 12, 1941

To Affiliated Stations

The United States District Court in New York today ordered, in conformity with a stipulation between counsel for the FCC and ourselves, that the Chain Broadcasting Order

and Regulations be suspended in their entirety until after the hearing and decision on our motion for an injunction. The hearing date for this motion and on motions made by FCC counsel has been postponed until December fifteenth. We are happy to report this development to you in line with our promise to keep you advised.

Herb. Akerberg.

[fol. 351] EXHIBIT "D" TO AFFIDAVIT OF HERBERT V. AKERBERG

Illinois Broadcasting Corporation

Quincy, Illinois

November 7, 1941.

Columbia Broadcasting System, Inc., 485 Madison Avenue, New York City, New York.

GENTLEMEN:

The Illinois Broadcasting Corporation, owner and operator of Radio Station WTAD, at Quincy, Illinois, has at all times complied with the rules and regulations of the Federal Communications Commission and desires and expects to continue to do so.

You are hereby notified that the contract entered into on November 15, 1940 by and between Columbia Broadcasting System, Inc. and Illinois Broadcasting Corporation insofar as said contract is in conflict with or fails to comply with the orders, rules and regulations of the Federal Communications Commission effective as of date November 15, 1941, or insofar as said contract fails to comply fully with said orders, rules and regulations of the said Federal Communications Commission is hereby declared abrogated and null and void. This action on the part of Illinois Broadcasting Corporation is made for the purpose of complying with the orders, rules and regulations of the Federal Communications Commission and is in accord with the terms and provisions of Paragraph 9 of said contract with you of date November 15, 1940, the provisions of said Paragraph 9 being as follows:

[fol. 352] "The obligations under this agreement are subject to all applicable laws, rules and regulations, present

and future, especially including rules and regulations of the Federal Communications Commission."

Respectfully, Illinois Broadcasting Corporation, (Sgd.) by Emery Lancaster, President. Studios W. C. U. Building.

[fol. 353] EXHIBIT "E" TO AFFIDAVIT OF HERBERT V. AKERBERG

WLAW

Columbia's Voice In Northern New England

Operated By Hildreth & Rogers Co.

Studios: 278 Essex Street

Lawrence, Massachusetts

November 8, 1941

Herbert V. Akerberg, Vice Pres., Columbia Broadcasting System, Inc., 485 Madison Avenue, New York, N. Y.

DEAR MR. AKERBERG:

In view of the new rules and regulations recently issued by the Federal Communications Commission and confirmed by their order, we would like to arrange a conference at your earliest convenience between your organization and ourselves, in order to adjust our contractual relationship to comply with the above.

It is our understanding that this should be completed before November 15th.

Very truly yours, A. H. Rogers (sgd.), Pres. & Treas.

AHR/h

[fol. 354] EXHIBIT "F" TO AFFIDAVIT OF HERBERT V. AKERBERG

Radio Station WBAB

Owned and Operated By The Press-Union Publishing Co.

Atlantic City, New Jersey

November 13, 1941.

Mr. Edward Klauber, Vice-President, Columbia Broadcasting System, 485 Madison Avenue, New York, N. Y.

Re: F. C. C.'s Chain Monopoly Regulations

To Become Effective November 15, 1941

DEAR MR. KLAUBER:

We purposely delayed writing you regarding the Federal Communications Commission's so-called chain-monopoly regulations, scheduled to become effective November 15th (and how these regulations will affect our contract with the Columbia Broadcasting System) in the hope that the matter would be amicably adjusted between the Commission and the networks, or that the matter would perhaps be delayed by the courts, temporarily at least, to give the networks and their affiliates an opportunity to gradually adjust their operations to comply with the new regulations.

We note that you have applied to the courts for an injunction but nothing having developed up to the present moment, we find it necessary, very much to our regret, to request that you arrange to submit to us a new contract, covering a period of not longer than two years and to be worded in accordance with the new regulations.

[fol. 355] As you know, Section 9 of our present contract sets forth that all of our agreements with you are subject to the rules and regulations of the Federal Communications Commission which would, it seems to us, automatically take care of the situation created by the new F. C. C.'s new chain monopoly regulations. However, the contract is for a five-year period, with three years still to run from January 23rd, 1942. We regret very much the necessity for making this request, but it is a situation over which we have no control, and we sincerely trust that something may develop to adjust

this situation before the new rules and regulations are scheduled to become effective.

—Very truly yours, Press-Union Publishing Company, Owners and Operators of Station WBAB. Albert J. Feyl (sgd) President.

AJF:H.

[fol. 356] EXHIBIT "G" TO AFFIDAVIT OF HERBERT V. AKERBERG

KLRD, Dallas.
50,000 Watts, 1080 Kilocycles.

The Times Hearld Station—Columbia Broadcasting System

Office and Studios, Adolphus Hotel, Dallas

November 19, 1941.

Columbia Broadcasting Company, New York City

GENTLEMEN:

It is our understanding that The Federal Communications Commission issued on May 2, 1941, regulations relating to contracts between standard broadcast stations and network organizations, which regulations were amended October 11, 1941, and were made effective November 15, 1941. We understand that some temporary order or stipulation has been entered delaying the enforcement of the regulations pending a hearing upon various petitions for preliminary injuctions. We do not know just what the effect of such order or stipulation may be or how long it will remain in force, but assume that you are fully advised and will know whether or not and to what extent such order affects the situation. At all events, we feel that we must notify you that if and when the regulations become effective the existing contract between Columbia Broadcasting Company and KRLD Radio Corporation will be considered by us as subject to all valid regulations of the Commission.

Very truly yours, KRLD Radio Corporation, by Albert A. Swinsky, Jr. (Sgd.)

[fol. 357] EXHIBIT "H" TO AFFIDAVIT OF HERBERT V. AKERBERG

KOMA, Oklahoma City's CBS Station.

Owned and Operated By Koma Incorporated

Biltmore Hotel, Phone 2-3291

December 20, 1941.

Registered Mail

Mr. Herbert V. Ackerberg, Columbia Broadcasting System, Inc., 485 Madison Avenue, New York, New York.

DEAR SIR:

This is to notify you that in view of Paragraph 9 in our agreement with the Columbia Broadcasting System, Inc., which provides that the contract shall be subject to all applicable rules and regulations, present and future, of the Federal Communications Commission, we construe our contractual relations with Columbia to have been modified so as to comply with the new network rules of the Commission to the extent that said contract may be inconsistent, or in conflict, with the provisions of said Rules.

Yours very truly, Bryan Mathes (Sgd.) Secretary-Treasurer.

Bryan Mathes/j.

[fol. 358] IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF FRANK STANTON

UNITED STATES OF AMERICA,
Southern District of New York
City, County and State of New York, ss:

FRANK STANTON, being duly sworn, deposes and says:

I am the Director of Research of Columbia Broadcasting System, Inc. (hereinafter sometimes called "CBS" or "Columbia") and I have been its Director of Research since November, 1938. I am also a member of the Advisory Board

of the Office of Radio Research of Columbia University and a Consultant to the Office of Facts and Figures, Washington, D. C. I am fully familiar with the records of the operations of Columbia and with records and statistical material and methods relating to the scientific measurement of program preferences of listeners and habits of radio listening. During the period, 1937-1940, I was Associate Director of the Office of Radio Research, Princeton University. Prior to joining CBS in 1935 I was a member of the faculty of Ohio State University for four years. As partial fulfillment of the requirements for my Ph.D. degree, in the field of industrial psychology, I conducted original research in the field of radio listening habits through the first use of [fol. 359] electrical recorders which measured actual radio receiver operation automatically.

This affidavit relates to:

A. Broadcasting of network sustaining programs by Columbia network stations.

B. Public dependence upon radio as a news source.

The analyses hereinafter described under Division A were conducted by my department in CBS and under my supervision. As to Division B, I am well acquainted with the research organizations and individuals, and am familiar with the research procedures and the particular research projects referred to. Such research procedures are generally recognized and accepted by the radio industry as gauges of listener habits or preferences.

A. Broadcasting of Network Sustaining Programs by Columbia Network Stations

1. Available CBS Network Sustaining Programs Broadcast by CBS Network Stations.

The CBS network stations broadcast the majority of the CBS sustaining programs available to them. From among those available they select those which fit their own time schedules and their own program needs. Obviously, the volume of such programs offered by Columbia must be much larger than if the needs of all stations were identical at all times.

An analysis of the sustaining program acceptance reports by CBS network stations for four typical weeks in 1941

shows the following average percentages of use of all available network sustaining programs by the network stations:

[fol. 360]

Week of	Percent of Available Network Sustaining Programs which were broadcast
February 2-8, 1941	57.1%
May 4-10, 1941	56.4
August 3-9, 1941	60.0
November 2-8, 1941	52.9
Average	56.7%[1]

Many of the network sustaining programs are made available to groups of network stations, rather than to all stations on the network. This is due, primarily, to two factors: first, the time differentials between different sections of the country which result in the offering of network sustaining programs to stations in one section when stations in another section are not in operation; and second, the fact that network sustaining programs are offered to stations in geographical groups at the same time that network commercial programs are being carried by stations in other geographical groups. The latter practice is followed in order to provide insofar as practicable with present program transmission facilities, each network station with a substantial volume of network service each day. There are deviate cases where, because certain program transmission lines are occupied with the transmission of network commercial programs, it is impracticable to supply other stations joined to the network by those lines with sustaining programs when they are not scheduled to receive the network commercial programs.

2. Broadcasting of Available CBS Network News and Cultural Sustaining Programs.

The CBS network sustaining programs in the four typical weeks in 1941 referred to before (*i.e.*, the weeks of February 2-8, May 4-10, August 3-9 and November 2-8) have been [fol. 361] further analyzed to segregate the network sustaining programs devoted to news and news analysis and the

[1] Stations on the CBS Network broadcast an average of slightly less than five hours a day of network sustaining programs during the above four typical weeks.

programs of cultural appeal. The average percentage of available network sustaining programs in each category which were broadcast by the stations is as follows:

Week of	Percent of Available Network Sustaining *News Programs* Which Were Broadcast	Percent of Available Network Sustaining *Cultural Programs* Which Were Broadcast
February 2-8, 1941	74.5%	65.5%
May 4-10, 1941	71.8	58.6
August 3-9, 1941	71.5	66.1
November 2-8, 1941	67.0	61.9
Average	71.0%	63.2%

The above percentages for news (71.0%) and cultural programs (63.2%) are higher than the average availability-acceptance ratio for all CBS sustaining programs (56.7%).

Not only is the time for many of these programs, which otherwise might be sold for commercial programs, set aside and withheld from sale by CBS, but the expense of preparation and talent is borne entirely by Columbia.

Included in CBS sustaining cultural programs are broadcasts of the New York Philharmonic-Symphony Orchestra, the Indianapolis Symphony Orchestra, the Cincinnati Conservatory of Music, the Columbia Concert Orchestra, and the Salt Lake Tabernacle Choir. Others include "Church of the Air", "Columbia Workshop", "The School of the Air of the Americas", "Invitation to Learning", "Of Men and Books", "The People's Platform", "Young Americans in the Making", and "Let's Pretend".

3. Broadcasting of CBS Network Sustaining Programs of Special Events.

Attached hereto as Exhibit A is a list of thirty outstanding special events programs broadcast as sustaining features of the Columbia network during 1941. During this [fol. 362] 12 month period, Columbia's scheduling of special events programs reflected the overshadowing importance of national and international events and the rapidly expanding interest of listeners in these developments. The thirty special events broadcasts listed in Exhibit A were accepted and broadcast by an average CBS network of 106 stations

or 88% of all the stations on the network.[2] This compares with the average of 56.7% acceptance and broadcast of available sustaining programs of all types, referred to above.

B. Public Dependence on Radio as a News Source

1. Reliance of the Public on Newspapers and Radio for News.

The usefulness of radio in the dissemination of news is reflected primarily by the extent to which people *depend* upon the radio for the news. A survey made by Elmo Roper for Fortune Magazine in 1938[3] in which this question was [fol. 363] asked, "From which one source do you get most of your daily news—the newspapers or radio news broadcasts?", disclosed that 45.2% of the people obtained their news from newspapers, and 23.5% from radio.

A similar study—involving the same technique, the same question and the same research organization—made three

---

[2] No adjustment has been made in computing the percentage figure because of time differentials and licensed operating schedules of certain stations or other factors which may have made it impossible for any station to broadcast any of these programs.

[3] Elmo Roper, 30 Rockefeller Plaza, New York City.

Elmo Roper, along with Dr. George Gallup, is one of the pioneers in the scientific sampling and measurement of public opinion. In addition to conducting the Fortune surveys of public opinion, which reported the most accurate of all national pre-election forecasts in 1936 and 1940, Roper maintains a nationwide field force to handle specific studies of media circulation, advertising effectiveness, public attitudes and special management problems.

The Fortune polls, from which data in this affidavit are quoted, are based on personal interviews with a representative cross-section of 3,500-5,000 individuals distributed throughout the United States according to the principles of scientific sampling. Each geographic section, income group, age group, sex group and education group receives the proper proportion of interviews based on the total U. S. population characteristics. In other words, each of Roper's nationwide samples is a miniature of the total U. S. population.

years later in 1941 disclosed an increasing dependence by the public upon the radio for news. Whereas the percentage that relied primarily upon newspapers dropped from 45.2% to 31.2%, the percentage of those who obtained news from radio rose from 23.5% to 39.4%.

The results of the later study showed the following trends by socio-economic groups.

	U. S. Average	Prosperous	Upper Middle	Lower Middle	Poor
Radio	39.4%	30.2%	33.3%	40.8%	45.4%
Newspapers	31.2	36.3	33.0	31.0	27.8
Both	26.2	33.2	33.0	25.9	22.0

It is significant that in the two lower socio-economic groups, involving approximately two-thirds of the population, there is substantially greater dependence on the radio as a source of daily news.

An explanation of the increased dependence on radio as a source of news is to be found in the answers to auxiliary questions asked in the same studies by Elmo Roper. First, those persons who said they got most of their daily news from radio were asked, "Why do you prefer the radio?". The replies were as follows:

Get news more quickly	28.4%
Takes less time to find out what is going on	19.5
More interesting and entertaining	11.9
Just don't read newspapers	7.6
Radio fairer than newspapers	6.9
Radio more complete than newspapers	6.6

[fol. 364]

Newspapers more confusing	4.3
No mistakes on radio	3.3
Work and listen at same time	2.8
Easier	1.6
Cheaper	1.2

Second, in answer to the question, "Which of the two—radio or newspapers—gives you the news more quickly?", the replies were:

Radio	83.0%
Newspapers	12.9

Third, in answer to the question: "Which of the two—radio or newspapers—gives you news freer from prejudice?", the replies were:

Radio	49.7%
Newspapers	17.1

Thus, speed and reliability are two factors responsible for the public's high appraisal of radio as a news source.

Radio's reputation as a reliable news source was even more sharply revealed in the Fortune study of 1938 when this question was asked:

"If you heard conflicting versions of the same story from these sources, which would you be most likely to believe?"

The answers showed the following results:

A radio press bulletin	22.7%	40.3%	(Radio)
A radio commentator	17.6		
An authority you heard speak	13.0		
An editorial in a newspaper	12.4	26.9	(Press)
A news item in a newspaper	11.1		
A columnist in a newspaper	3.4		
Depends on paper, writer, speaker	11.6		
Don't know	8.2		

On the basis of this report, radio has a 50% higher factor of credibility in the public mind than newspapers.

[fol. 365] 2. Radio News and the Lower Income Groups.

The 1941 Roper study previously referred to shows the increased dependence on radio as a news source by those in the lower income groups as compared with those in the higher income groups.

Supporting evidence of this trend is found in a study made by the Office of Radio Research of Princeton University [4] in 1939. The object of the study was to determine

---

[4] Office of Radio Research

This office is now at Columbia University, being the continuation of a radio research project begun at Princeton University in the Fall of 1937 and is supported by a grant from the Rockefeller Foundation. The objective of the office is to develop methods of listener research which will con-

whether radio's usefulness to the public varied with the economic status of the listeners. In personal interviews, a representative sample of 5,528 persons were asked "What is your regular source of news? If more than one, which do you prefer?" The answers disclosed that, in the upper in- [fol. 366] come group only 4.9% depended upon radio alone as a source of news and 38.4% preferred radio to newspapers, while in the middle income group the percentage of those who used radio as an exclusive news source was 7.8%, and of those who preferred radio to newspapers was 50.9%. In the lower income group, however, it was found that 15.0% depended *exclusively* upon radio for news, and 55.6% preferred radio to newspapers.

3. Urban and Rural Dependence on Radio News.

The Princeton University study recorded also the preference of urban and rural dwellers for radio as a source of news. In cities over 100,000, radio was preferred by 45.6% as a source of news, whereas in rural areas (farms and towns of 2,500 or less), 55.8% preferred to learn the news by radio.

---

tribute to an understanding of the role played by radio for different groups of listeners in the United States.

Several outstanding contributions, both in techniques and analysis, have come from this non-profit research enterprise in the field of communications. The work of the office has included several major studies and numerous minor ones which have been reported from time to time in the scientific journals and more recently in book form ("Radio and the Printed Page" by Paul F. Lazarsfeld, "Radio Research 1941" edited by Paul F. Lazarsfeld and Frank Stanton).

The Office of Radio Research is under the full-time direction of Dr. Paul F. Lazarsfeld, who has an Advisory Board composed of the following members: Dr. Robert S. Lynd, Chairman, Professor of Sociology, Columbia University, Dr. Lyman Bryson, Professor of Education, Teachers College, Columbia University, Dr. Herbert Brucker, Professor of Journalism, Columbia University, Dr. Frank Stanton, Director of Research, Columbia Broadcasting System and Dr. Samuel A. Stouffer, Professor of Sociology, University of Chicago.

Further evidence of the interest of the rural population of America in radio news was reflected in a study made in 1941 by Dr. H. B. Summers [5] in the state of Kansas where the [fol. 367] population is predominantly rural. Seven thousand representative listeners were interviewed and asked to select, from a list of 16 general types of programs, the five types which he or she liked best. The table below summarizes the answers to these questions presenting the figures separately for urban and rural (farms and towns of 2,500 or less) listeners:

	Urban	Rural
News broadcasts	72.4%	79.6%
Comedians	63.6	57.2
Audience participation	51.8	48.9
Popular music	47.7	32.7
Variety shows	40.0	34.6
Oldtime music	20.6	34.7
Sports broadcasts	23.3	17.1
Complete drama	33.3	27.8
Market reports	5.6	30.9
Religious music	26.6	31.2
Serial drama	30.2	32.3
Band music	19.9	19.0
Talks, comment	18.4	14.2
Classical music	24.7	11.0
Devotionals	13.7	16.8
Talks on farming	4.0	11.4

[5] Dr. H. B. Summers, Kansas State College, Manhattan, Kansas

Dr. H. B. Summers at the present time is acting director of the Public Service Division of the National Broadcasting Company. Before this, Dr. Summers was Chairman of the Department of Speech and Radio at Kansas State College, Manhattan, Kansas. While at the university Dr. Summers conducted annual studies of radio listening in the States of Kansas and Iowa each spring beginning in 1937. These studies represented the first published statewide investigations of habits and preferences of radio listeners.

The studies, conducted by trained investigators by means of personal interviews, have followed the same general pattern each year. Approximately 7,000 interviews were

In the 1941 study by Elmo Roper, previously referred to, the responses of rural and urban dwellers to the question, "From which one source do you get most of your daily news —the newspapers or radio news broadcasts?", were analyzed, and the results are shown in the following table:

	Urban	Rural
Radio	36.6%	43.0%
Newspapers	34.2	27.3
Both	26.9	25.2

[fol. 368] These three studies not only confirm the importance of radio as a source of news, but demonstrate that among rural listeners, as distinct from urban listeners, the margin of the preference for radio is significantly wider.

4. The Elmer Davis Audience.

The over-all popularity of news broadcasts is demonstrated by the size of the audiences who listen to a specific CBS news program. Every two weeks for the past two years Samuel E. Gill[6] has been measuring the audiences of

---

made annually with representative families throughout the state distributed in proportion to population.

The questions asked in these annual studies concerned ownership of radios, station listening habits, audience availabilities, preferences for specific programs and preferences for general program types.

[6] Samuel E. Gill, 52 Vanderbilt Ave., New York City

Mr. Gill conducts an independent research service specializing in the measurement of media circulation, advertising effectiveness and public opinion.

Because the two standard program rating services do not make a practice of rating five-minute programs as a part of their regular services CBS commissioned Mr. Gill to set up a countrywide plan for checking the Elmer Davis news audience regularly.

The method adopted for surveying the Elmer Davis audiences is known as the "immediate recall" plan. Representative telephone families are contacted for 15 minutes immediately following the close of the Davis broadcast. Each person answering the telephone is asked questions which elicit information whether he or she listened to the Davis broadcast.

"Elmer Davis and The News", a five-minute, seven-times-a-week CBS program. On the basis of the Gill studies it is estimated that currently 15,000,000 people listen to Elmer Davis on the average night.

It is also estimated that a total of 30,000,000 *different* people hear the program during the average week. This [fol. 369] accumulated audience is explained by the fact that whereas approximately the same number hear Elmer Davis each of the seven nights, the same people do not hear him every night. Some listeners drop out, others are added, so that during a week's broadcast the total number of different people who hear him at least once is far greater than the audience of a single broadcast.

Frank Stanton.

Subscribed and sworn to before me this 5th day of January, 1942. George A. Burwell, Notary Public. N. Y. Co. Clk's No. 527, Reg. No. 3B800. Kings Co. Clk's No. 119, Reg. No. 3459. Bronx Co. Clk's No. 62, Reg. No. 248B43. Queens Co. Clk's No. 2167, Reg. No. 8330. Certificates filed in Westchester and Richmond Counties. Commission Expires March 30, 1943. (Seal.)

The Elmer Davis audience is checked by Gill in 20 representative cities the first and third weeks of each month. A minimum quota of 4,800 telephone interviews is made during each 7-day period.

These special bi-weekly measurements of the Elmer Davis audience were begun in the Spring of 1940 and have continued through to the present time.

[fol. 370]

EXHIBIT "A" TO AFFIDAVIT OF FRANK STANTON

Outstanding CBS Special Events Programs Broadcast During 1941

Day and Date	Program	Time
Mon., Jan. 6	President Roosevelt's Message to Congress	2:00- 2:45 PM
Mon., Jan. 20	President Roosevelt's Third Inaugural Ceremonies: The Nation Prays With The President	10:30-10:37 AM
Mon., Jan. 20	President Roosevelt's Third Inaugural Ceremonies: Description of Inaugural Parade	2:30- 3:00 PM
Sun., Feb. 9	Prime Minister Churchill reporting from London on "The Progress of World War II"	3:00- 3:37 PM
Sat., Mar. 15	President Roosevelt speaking on "Aid to the Democracies" at the White House Correspondent's Dinner	9:30-10:08 PM
Tues., Mar. 25	Lord Halifax, British Ambassador to the United States, speaking on "British War Aims" at the Pilgrim Society Dinner	10:15-11:08 PM
Sun., Mar. 30	Variety Program, starring Marian Anderson, Ethel Waters, Joe Louis and Duke Ellington, in behalf of the National Urban League's campaign to aid the Negro unemployment problem	5:00- 6:00 PM
Sun., Apr. 13	Pope Pius XII giving his Easter Message from Vatican City	6:00- 6:48 AM
Sun., Apr. 27	Prime Minister Churchill reporting on "The Progress of World War II and American Aid to Britain" from London	4:00- 4:33 PM
[fol. 371]		
Sat., May 10	Colonel Charles A. Lindbergh and others speaking at a rally of the America First Committee	10:15-11:00 PM
Tues., May 27	President Roosevelt clarifying the national policy in a "Fireside Chat" to the nation	10:30-11:15 PM
Sun., June 22	Prime Minister Churchill speaking from London on Hitler's invasion of Russia, followed by a two-way conversation between Elmer Davis in New York and Edward R. Murrow in London on British reaction to Mr. Churchill's speech and the war in general	3:00- 3:27 PM
Thur., June 26	Pope Pius XII addressing the Ninth National Eucharistic Congress in St. Paul, Minn., from Rome	2:00- 2:17 PM
Tues., July 8	Description of All Star Baseball Game from Detroit	2:15- 5:00 PM
Mon., July 21	President Roosevelt proclaiming to Congress that a state of national emergency existed in this country	3:30- 3:50 PM
Sun., Aug. 10	Queen Elizabeth, speaking from England, to thank the American relief organizations for their British Aid	4:00- 4:12 PM
Sun., Aug. 24	Prime Minister Churchill speaking from London on his meeting with President Roosevelt and the progress of the war	4:00- 4:30 PM
Mon., Sept. 1	President Roosevelt's Labor Day Address from Hyde Park	1:46- 2:00 PM
[fol. 372]		
Mon., Sept. 1	Heads of governments in exile in London speaking from that city on the Second Anniversary of World War II	4:00- 4:45 PM
Thur., Sept. 11	President Roosevelt outlining our government's future foreign policy in a talk from the White House	10:00-10:30 PM

EXHIBIT "A" TO AFFIDAVIT OF FRANK STANTON—Continued

Day and Date	Program	Time
Thur., Sept. 25	One of the weekday series of descriptions of the "battle" between the Second and Third Armies in Louisiana	4:30- 4:45 PM
Wed., Oct. 15	Secretary of Agriculture Wickard outlining a 1942 farm defense program in his speech on "Food For Freedom"	10:15-10:30 PM
Mon., Oct. 27	President Roosevelt addressing the Navy League Dinner in Washington	10:00-10:30 PM
Tues., Nov. 11	Red Cross Roll Call broadcast: speeches by Vice President Wallace, Secretary of War Stimson, Secretary of Navy Knox; Associate O.P.M. Director General Hillman, and Red Cross President Davis	10:00-11:00 PM
Tues., Nov. 18	Wendell L. Willkie speaking on "A Better Understanding for Labor"	10:30-10:45 PM
Sat., Nov. 29	The Army and Navy annual football classic at Philadelphia	1:15- 4:00 PM
Mon., Dec. 8	President Roosevelt's war message to Congress and description of Congressional voting proceedings	12:15- 1:30 PM
[fol. 373]		
Mon., Dec. 8	Prime Minister Churchill speaking to the United States re: Britain declaring war on Japan	3:00- 3:22 PM
Tues., Dec. 9	President Roosevelt's first wartime Fireside Chat	10:00-10:30 PM
Mon. Dec. 15	Bill of Rights Commemoration Program. Brief address by President Roosevelt and drama specially written by Norman Corwin	10:00-11:01 PM

[fol. 374] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF EDWARD KLAUBER

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss.:

EDWARD KLAUBER, being duly sworn, deposes and says:

I am the Executive Vice-President of Columbia Broadcasting System, Inc. (hereinafter called Columbia or CBS), have been its Executive Vice-President since 1936 and have performed the same duties under various other titles since August, 1930. I was previously employed by the New York Times successively in reportorial and editorial capacities for 13 years and prior to that by the New York World for four years. I have been instrumental in the formulation of Columbia's program policies and have had direct supervision of the general execution of such policies.

The program policies of Columbia, just as the editorial policies of any printed publication, determine its character and the public reputation which it enjoys. The reputation which a printed publication enjoys is reflected in terms of its circulation; the reputation of Columbia is reflected in [fol. 375] terms of its listening audiences and the degree to which they trust and rely upon Columbia programs.

Accordingly, Columbia has always striven, in discharging its obligations in the public interest, which it is firmly convinced is also its own long-time interest as a publication, to establish a character and a reputation of the highest order. Its policies with respect to important types of programs have from time to time been incorporated in formal statements, some of which are set forth below.

General Policies Respecting Controversial Public Issues. In the President's annual report to CBS stockholders for the year 1935 appears the following which was a clarification and re-statement of principles which had governed its conduct to an increasing degree since the inception of its business:

"The Columbia Broadcasting System does not sell time to individuals or groups for the discussion of controversial public issues such as, for example, taxation, legislation or regulation. It supplies its time and its facilities as a public duty and refuses to accept pay for it. The sole exception to this principle is that after the candidates for the presidential election have been nominated, we cease giving time to the political parties and for the duration of the campaign, sell it, because during those few months the parties require, and should have, more time than we can afford to give away.

"The Columbia Broadcasting System is charged with editorial responsibility for what goes out over its network. It could not escape this responsibility if it would, and would not escape it if it could. In discharge of this responsibility, we will continue to allot available time for the discussion of public questions to spokesmen for opposing views. In allotting such time, we shall exercise our best and most informed judgment in maintaining program balance. By program balance we mean offering to the public all kinds of entertainment, instruction and information—the well-balanced radio fare which it wants and to [fol. 376] which it is entitled. We shall be further guided

in such allotments of time by day to day developments, by the shifting of public interest, and by the relative importance of topics available for discussion.

"At this point I wish to explain what we mean by editorial control and editorial judgment. We do not censor ideas. We do not ask that the views of any speaker agree with those of any member of our editorial staff nor has Columbia views of its own which must be maintained or protected. Our practice of having proposed addresses submitted to us in advance is based on our direct responsibility for what goes out over our stations. We examine proposed addresses first of all, to determine that they are interesting; second, that they are not libelous or slanderous; and third, that in questions of taste they are properly constructed to be heard in the living rooms of the nation by people gathered together in groups of every conceivable assortment.

"Our reasons for refusing to sell time for public discussion and for insisting upon giving it away instead, are three-fold. First, we believe that we have a public duty to bring such material to our audience regardless of the willingness of others to pay for it. Second, we believe that such discussion should be kept in balance by editorial judgment. If we sold time for the discussion of controversial issues, we would in fairness have to sell to all with the ability and the inclination to buy at a given moment. Thus we should surrender all possibility of regulating the amount of discussion on the air in proportion to other elements of well-balanced programming. Third, and by far the most important, we realize that if we sold time for the discussion of controversial public issues, for the propagation of the views of individuals or groups, we would necessarily allow a powerful public forum to gravitate almost wholly into the hands of those with the means to buy it.

"In conformance with our refusal to sell time for discussion of controversial public issues, we limit our adver- [fol. 377] tisers in their messages to the sale of their goods or services, or the promotion of public good will for their industry. As a simple example of what I mean, we would glady sell time to a common carrier for the promotion of travel, but if we were asked to sell time to such a carrier which it would use to agitate for new rates or different regulation, we would refuse."

Political Broadcasts. In connection with the sale of time to political parties during campaign periods, noted above, the question of the dramatization of political issues first arose, also during 1935. After the most careful consideration Columbia concluded at that time that it would render only a public disservice if it accepted such dramatizations. I stated, in my letter of December 27, 1935 which was made public, Columbia's reasons for not accepting this form of political broadcast, as follows:

"Appeals to the electorate should be intellectual and not based on emotion, passion or prejudice. We recognize that even the oratorical discussion of campaign issues can be to a degree stamped with the aforementioned flaws, but we are convinced that dramatizations would throw the radio campaign almost wholly over to the emotional side. Then, too, we believe that the dramatic method by its very nature would tend to over-emphasize incidents of minor importance and significance, simply because of the dramatic value. While we realize that no approach to the electorate is absolutely ideal, we believe American voters have long been trained to discriminate among the assertions of orators, whereas we do not believe they could discriminate fairly among dramatizations, so that the turn of national issues might well depend on the skill of warring dramatists rather than on the merits of the issue debated."

News Broadcasts. In the early part of 1939 Columbia expressed its conception of its obligation with respect to dissemination of news, in a letter written by me to an exec- [fol. 378] utive of the National Association of Broadcasters, as follows:

"The underlying theory of a democracy is that, if you give people honest grist to grind on, they can reach the right decisions; in other words, the primary service which a broadcasting company can render in the news field is to inform the public as to what is happening and to make as clear as possible the significance of events, rather than to express either its own approval or disapproval or to devote its time to the editorial opinions of some particular commentator. This is especially true since the broadcaster, if he is to maintain program balance, cannot devote so much time to news that the commentator becomes an incident in the presentation, as well may be the case with the

columnist in a newspaper. If a broadcaster devotes a reasonable amount of time to fair and two-sided discussion of controversial public issues, using representative speakers to give differing points of view, he is providing debate and the expression of opinion on controversial issues in a far more effective way than it can possibly be provided by one or even a handful of commentators, regularly expressing personal points of view on every conceivable subject.

"News periods, therefore, should be devoted to giving the facts emanating from an established news-gathering source, to giving all the color (in the proper sense of the word), and interest, and so on, without intruding the views of the commentator. It further can, and very often should, give as much light as possible on the meaning of events. In other words, the commentator should not say that they are good or bad, in his opinion, but should analyze their significance in the light of known facts, the results of similar occurrences, and so on, and in this he of course should always be fair. He is fully entitled to give and should give the opinions of various persons, groups, political parties, and so on, when these are known, leaving the listener to draw his own conclusions after he has been, as well as pos-[fol. 379] sible, informed about the event, its meaning, the attitude of persons or groups toward it, the known results of similar things in the past and so on."

On October 17, 1939, shortly after the outbreak of war in Europe, in recognition of our responsibility in the handling of news, we issued a public bulletin to advertisers and others in which we stated:

"CBS is currently broadcasting a carefully planned and regularly spaced schedule of news programs covering the war, with due regard to audience interest and program balance. All news broadcasts, including news sources, news preparation, news announcers and their method of delivery, are subject to CBS supervision and are part of the network's public responsibility. Advertisers are requested to make no plans for new or additional news broadcasts without prior consultation with us."

Even prior to this public announcement, we issued on September 5, 1939, immediately after the outbreak of war in Europe, a general memorandum for the guidance of our own organization. A copy of this memorandum is annexed hereto as Exhibit "A". With the attack on Pearl Harbor

less than a month ago and our formal entry into the war, new problems have arisen. A copy of the current CBS memorandum of instructions to its news organizations is annexed hereto as Exhibit "B".

Religious Broadcasts. Since the early part of 1931 Columbia has not sold time for religious broadcasting. This decision was taken because it was found manifestly unfair to make our facilities available only to such ministers, religious organizations or parishes as happened to have the funds and the desire to buy time. During that year Columbia consulted with various religious leaders and as a result established a Religious Advisory Committee, representative of the outstanding faiths and denominations, which has continuously cooperated and advised with us in [fol. 380] our Church of the Air programs to this day. Columbia's religious policy was announced at that time, and was succinctly restated in an office memorandum in 1933 as follows:

"We do not under any circumstances sell time for programs of a religious nature, or make any charge of any sort for the programs of this type which we present on the air, nor do we countenance any programs which are devoted wholly or in part to attacks on the religious faith and convictions of any group of American citizens. We believe it is not in conformity with public interest, convenience or necessity to permit on any pretext whatsoever the use of radio facilities for attacks on the clergy or lay members as representing any denomination.

"Inasmuch as it would be impossible for us to grant all requests received from individual churches and religious groups, for time on the air, we allot a half-hour period for religious broadcasting each Sunday morning and afternoon. These periods are assigned to the major established faiths, namely, Protestant, Jewish and Catholic, Christian Science, Mormon and Dutch Reform. The outstanding denominations of the Protestant Church are included in this group.

"The arrangements covering our religious services are made by us after careful consideration and consultation with representatives of the faiths and denominations presented on the air. It is our desire and policy to have these

programs conform as nearly as possible to the regular morning and afternoon services held within churches. We do not schedule any one individual for a series of religious programs, believing we will render a more progressive and beneficial service by enabling the nation as a whole to hear the greatest number and largest variety of our distinguished religious leaders. We consider also that this practice encourages and helps to develop new leaders.

"It is our plan and desire to make the Church of the Air services representative of the outstanding religious thought in the country and representative, as well, of all the geo- [fol. 381] graphical sections of the country; to insure their being both nationwide and international in their scope. Programs are presented by some of the most outstanding religious leaders in Europe, in England, Ireland and Canada. During Lent and Holy Week special series of broadcasts are arranged from the great cathedrals and distinguished leaders speak from their pulpits or from our studios in commemoration of this religious period.

"It is recognized, of course, that there are numerous other groups of our citizenry who are followers of religious teachings or concepts which are not included in the faiths enumerated above. Our policy is not formulated upon a discrimination against any one or all of them; but is based primarily upon a consideration of the public interest and necessary limitation upon available time."

Columbia's basic policies with respect to the treatment of children's programs, length of advertising messages, advertising products in good taste, and other basic practices relating to commercial programs are set forth in Columbia's statement of May 15, 1935, a copy of which is annexed as Exhibit "B" to Mr. Paley's affidavit herein verified October 30, 1941.

Edward Klauber.

Subscribed and sworn to before me this 5th day of January, 1942. George A. Burwell, Notary Public. N. Y. Co. Clk's No. 527, Reg. No. 3B800; Kings Co. Clk's No. 119, Reg. No. 3459; Bronx Co. Clk's No. 62, Reg. No. 248B43; Queens Co. Clk's No. 2167, Reg. No. 8330. Certificates filed in Westchester and Richmond Counties. Commission Expires March 30, 1943. (Seal.)

[fol. 382] EXHIBIT "A" TO AFFIDAVIT OF EDWARD KLAUBER

September 5, 1939.

CBS European War Coverage

A Memorandum Governing General Operations For the information of the organization

This memorandum is issued to formalize and amplify the instructions under which we have been operating ever since the crisis developed.

Our plan of operation represents no basic change in the policy which this company has maintained in the past. This policy has been to deal honestly, accurately and fairly with the news and with public discussion.

Columbia's announced policy of having no editorial views of its own and not seeking to maintain or advance the views of others will be rigidly continued.

President Roosevelt said in his address to the nation on Sunday night that America is the best informed nation in the world. This is because we have in America a free radio and a free press. We shall continue to keep America as well informed as possible on all phases of the war, including the propaganda of various nations, and the proposals and discussions which go on in this nation and other nations about war or any aspect of it. We are not responsible if the facts either help or hinder participants in the conflict or either please or displease advocates in America of any particular line of conduct here or elsewhere.

Columbia, as an organization, has no editorial opinions about the war. It has no editorial opinions about what this [fol. 383] country or any other country should or should not do. Those, therefore, who are its voice in presenting or analyzing the news must not express their own feelings. This does not preclude informed appraisals of the meaning of facts. The opinion phase of the situation will be covered by speakers under our usual policy for the fair discussion of controversial public issues.

In being fair and factual, those who present the news for Columbia must not only refrain from personal opinion, but must refrain from microphone manner designed to cast doubt, suspicion, sarcasm, ridicule or anything of that sort on the matter they are presenting. This should be partic-

ularly observed when it is necessary to interpolate comment because an address is being received in a foreign language or in running fragments necessitating the filling in of time between breaks. It should always be remembered that the speaker is entitled to get his own point of view over as effectively as he can.

What news analysts are entitled to do and should do is to elucidate and illuminate the news out of common knowledge or special knowledge possessed by them or made available to them by this organization thru its news sources. They should point out the facts on both sides, show contradictions with the known record, and so on. They should bear in mind that in a democracy it is important that people not only should know but should understand, and their function is to help the listener to understand, to weigh, and to judge, but not to do the judging for him.

It is impossible, within any reasonable limits, to define completely this last-mentioned aspect of news analysis. Fairness and temperateness are of its essence.

In this connection, prophecy, so far as possible, should be avoided. It is foolish to say "Germany will be licked in six [fol. 384] months." It is perfectly proper to say that certain military experts (or the speaker himself, if he be such an expert) believe, in the light of the following known military facts that the defeat of Germany in six months might be possible. An unexcited demeanor at the microphone should be maintained at all times, though the tempo can of course be varied with the nature of the news. Dire forebodings, leaving the radio audience hanging up in the air and filled with suspense and terror, of our own creation, are not good broadcasting. We should not tell the listener that, at this very moment, innocent women and children may be drowning somewhere in the Atlantic because another ship may have been torpedoed by a German submarine, or anything of that nature.

The basis of our operations is a staff of trained Americans, both in this country and in Europe, most of whom have had news training with newspapers or press associations, and all of whom have had training in broadcasting in general and in our own operations in particular. We are to continue to use Americans as far as possible and all our correspondents abroad have been instructed and will be reinstructed not to make use of foreigners (except on those

occasions where they are making speeches frankly presenting their own points of view). Foreigners will be used in our regular news coverage only in emergencies when a satisfactory American cannot be immediately obtained. In these cases his nationality is to be stated.

We have three main sources of news: 1) the three press associations—the Associated Press, the United Press, and the International News Service; 2) information possessed or obtained by our own staff of editors in the News Department and our news analysts here and our news staff in Washington, London, Paris, Berlin, Warsaw, Rome and Tokyo, and such other points as we cover from time to time; [fol. 385] 3) shortwave broadcasts by government-owned European stations and miscellaneous sources of information of various sorts.

In making use of all of these sources, we must at all times be careful to label information for what it is, using the same kind of care that is habitually used by press associations and good newspapers. We must try to distinguish fact from rumor, official information from semi-official 'high sources' and so on, and from mere gossip. Of course the greatest weight should be given to those things known to be factual. We should make known at frequent intervals that the news received from many sources is censored and that, therefore, it may be incomplete and at times even inaccurate.

If all our own people presenting news will present it in this way and analyze it with due weight given to these factors, we can keep the American public very well informed on every phase of things as they develop, help them continually to appraise and weigh the news, and make them well aware of current opinion throughout the world. It must be recalled that this opinion is, in itself, a fact. For instance, if the British people believe that the Germans are committing atrocities, the fact of their belief is important. That these atrocities are real, false, or unproven is another fact. Broadcasting of properly identified fact, allegation, opinion, rumor and all the other attendant circumstances in which the conflict progresses will continue to keep the American listener the best informed in the world. In no other way can he know all that he should know.

In presenting the addresses of foreign statesmen and other speakers, we will be guided solely by news judgment

(in the light of program balance). If we present them when the given situation indicates that they should be heard over [fol. 386] here, we shall do a fair and honest news job. We will have to use our best efforts to overcome the handicap of one side not talking our language. We also will have to be guided by the breaks of the news. For example, if Hitler speaks one day and no one else does, or if Chamberlain speaks and no one else does, it would of course be silly to leave off the speech of one side because we had none from the other. An excellent example of how fair and comprehensive broadcasting can be was furnished on Sunday, when there were speeches from London, from Paris, and from Canada, but none in Germany which were made available for broadcasting. We succeeded in obtaining the text of various Hitler proclamations and statements and presented his side perhaps just as well as if he had spoken.

The point in the foregoing and in guilding much of our operation is that, if we will honestly and sincerely try to present the news, regardless of which way it points, we shall do a much better job than if we merely strive for a sort of mathematical fairness. Let us take for example the round-ups of editorial opinion which we occasionally present. Decision to present one of these should be based solely on a belief that newspaper reaction to a given thing (the British-French declaration of war, or the President's speech at the outbreak of the war) is of great interest to the general public. As long as we present them on this basis, we are being honest and fair. The minute we presented one because somebody here had some personal desire to influence public opinion on some given question, we should be operating badly. By the same token, if we refrained from presenting one because it did not reflect the point of view we had hoped for, or if we selected editorials to make a particular point of view emphatic, we would be doing an intolerable kind of job. I know this would never happen here; I mention it merely by way of illustration.

[fol. 387] The same thing applies to presenting either individual broadcasts of European government stations or a summary of such operations for a given day. If we were merely on a mathematical basis to present so many minutes of each, it might very often be dull and tedious. If, with honest news judgment, we pick out what is salient, we will do a good job even though on one occasion we might present

nothing except that which had been said over a German station or some station presenting the point of view of the other side. Here, too, we must be guided by honest, sincere news judgment and our fundamental purpose of presenting all points of view as the breaks of the news require.

We come now to the question of speeches over here on public questions related to the war. Here we shall follow our traditional policy. If there are persons in America who think we should enter the war and others who think we should keep out, we shall permit the public debate of this question, selecting as far as possible, speakers with varying points of view. We cannot do an honest job for the American public without letting them know that there are varying opinions and that these opinions are being agitated. In the same way, if, for example, the President, proposes repeal of the present Neutrality Act, we shall carry as fully as possible the outstanding debate on this issue. The amount of debate naturally will be gauged by the public interest in the current question, its importance and the imminence of action.

Our own purveyors of news over the air, both here and abroad, will be free to deal with controversial issues discussed in speeches, the same as they deal with any other phase of the general situation. For instance, they may give factual information about the progress of the argument, and our broadcasters from abroad may tell how those countries feel, what their officials are doing, if anything, towards trying to influence a given issue over here, and so on, as long [fol. 388] as the broadcaster himself refrains from doing anything that comes out of himself which is designed to influence action one way or the other.

This memorandum has purposely been made lengthy in the hope of clarifying the thinking of all concerned about the general principles which will guide us in broadcasting the war. As a final word, it should be remembered that Americans should know everything we can possibly tell them about every phase of the situation, provided only that it is important that we put it out for exactly what it is, that we do our best to inform and explain with honesty and sincerity, and thus demonstrate once more that radio plays a fremendous part in the maintenance of all that is best in a democracy.

Edward Klauber, Executive Vice-President.

[fol. 389] EXHIBIT "B" TO AFFIDAVIT OF EDWARD KLAUBER

Columbia's War Coverage

A Memorandum to the CBS News Organization

President Roosevelt has said that America is the best informed nation in the world. This is because we have a free radio and a free press. In war time it becomes more important than ever that we should continue to be the best informed people in the world. This is essential for two reasons; first, in order that military and civilian morale be kept at the highest possible level so that we may win the war and win it as quickly as possible. Second, in order that the nation may be kept keenly conscious of why we are fighting this war, to the end that we may also win the peace.

This is a war for the preservation of democracy. The American people must not only always be kept vividly aware of this objective but of the value to every man, woman and child in the nation of preserving democracy. Thus we shall become capable of the utmost nation-wide effort and endurance because we shall all share a common knowledge of the nation's purpose in war.

And that same common knowledge and common valuation of our national heritage will do more than any one thing to insure that we win the peace. The peace will be won if, after victory in the war, and regardless of what we may have to endure in the immediate post-war years, we shall hold fast to democracy and the essential freedoms.

In keeping America the best informed nation in the world in war time we obviously face new difficulties and certain limitations. We should do our utmost to surmount the difficulties and to circumscribe the limitations to absolutely essential areas and to apply them, even within those areas, with common sense and judgment. In other words let us never adopt a negative attitude of fear and retreat, so that [fol. 390] we search out for ourselves self-imposed areas of intellectual black-out. Rather let us try to keep on illuminating every area of the national life, our own military effort and the manifold phases of the world struggle, as far as we can possibly do so with assurance that we are doing good and not harm. Thus, we will be using all our skill and judgment in adopting our trained resources of man-power and

our technical facilities to shedding light and not darkness. This of course we must do without running counter to the national objectives.

There is not room within the scope of this memorandum to do more than hint at the reasons why it is more important than ever to keep the American people the best informed in the world. Certainly, their habit and their expectation is to know; they are not a regimented or blindly obedient people and their support for what they understand will be incalculably greater than their obedience to blind command. They will surrender anything, including many of their present liberties, if they surrender them consciously and after they are made to understand why they must be given up and if the atmosphere is one of temporary and willing surrender for a common purpose.

Moreover, the American people will trust the civil and military authorities only if they believe and know that as far as is possible and consistent with the military effort the truth is being told to them and they are not being deceived. Besides all this, they will be far less a prey to enemy propaganda than if they are so ill-informed that they may easily fall victims to the destructive effect of every rumor set afloat for the purpose of dismaying and confusing them.

American democracy has functioned always in a spirit of free speech which has involved free and open criticism. This function must be preserved lest any serious mistakes go undetected and uncorrected and lest the people lose confidence in their leaders because they feel that they are being [fol. 391] told too little. Any mechanism of suppression for other than immediate military motives almost certainly will eventually fail and then great damage will have been done and ground lost which it will be slow and difficult to regain.

Our news operation in war time, therefore, is not essentially different from what it is in peace time. We simply have to apply the same judgments and the same skills to new problems. We have to be as energetic and resourceful as possible in keeping the radio audience informed; at the same time we have to see to it that we do not broadcast information of military value to the enemy and that we do not cause unnecessary and useless anguish, suspense, or confusion among our own people or any part of them.

Informing the radio audience means, without hysteria and with all due and proper restraint, keeping vividly, color-

fully, and honestly before our people all that is going on in the world, including both the things that touch the minds and the things that touch the hearts of men. Of course, we must limit ourselves to what can properly be told, and make certain that as far as possible the proper evaluation is placed upon the material and that to the best of our ability we explain and illuminate its meaning.

The restraints we must exercise fall into two categories; (a) self-restraint dictated by common sense, news judgment and our growing experience with changing conditions, (b) full and prompt obedience to any lawful directions given to us by constituted authorities, reserving to ourselves only the right afterwards to discuss with such authorities the wisdom of any directive which we may believe should be rescinded or altered.

In all that we do we must bear in mind that we must never allow competition among broadcasters or between a broadcaster and other media of public information to betray us into recklessness or irresponsibility. Columbia wants to be first with the news whenever it can and as often as it can, [fol. 392] but Columbia would rather be last, or never broadcast certain material at all, than to rush on the air with news that should not have been put out. In this connection, it should be remembered that we have in our medium the power of virtually instant correction and we must never hesitate to correct as rapidly as possible any erroneous fact or wrong impression that we may at any time broadcast.

In evaluating news we should, of course, look first of all to official and qualified sources, second to the press associations and our own world-wide news gathering facilities, and third to rumor, voluntary informants, broadcasts by enemy nations, and so on. Extreme care and vigilance must be used in accepting material from any of the last-mentioned sources. Every possible effort should be made to verify it before its use. If judgment dictates that some of it should be broadcast as unverified rumor or as emanating from enemy sources, it not only should be used with care and reserve, but its precise nature and origin should be carefully pointed out and its probable purpose and meaning should be indicated.

In regard to what constitutes military information that might be of value to the enemy, various government depart-

ments have already indicated definitions. The following subject matter is to be avoided, *unless officially disclosed:*

1. Movements or location of any war or naval vessels or planes, as well as the identity of personnel on such vessels or planes. This, of course, applies to aircraft and seacraft belonging to our Allies as much as to those belonging to the United States.

2. Movements of merchant vessels flying the flag of the United States or of any Ally.

3. Troop movements.

4. Assembly, movement or embarkation of war material.

[fol. 393] 5. The identity of any American or Allied merchant vessels attacked by the enemy, as well as the identity of any of its officers or crew.

6. Details regarding the strength or activity of any navy or military shore establishment.

7. Any experiments with war material, particularly relating to new inventions.

8. The laying of mines or mine fields.

9. Secret notices or instructions relating to aids to navigation.

10. Weather information. This, at present, is to be treated as a local problem by each station and authorities in each area will determine whether weather reports are to be broadcast.

11. Selective service quotas—area, state or local.

12. Casualty lists.

It should be stressed again that there is no proscription on any of these topics *if they are officially released.* However, CBS news editors should reserve the right of decision as to whether they wish to broadcast certain information even when approval has been granted.

From time to time each CBS news man will receive certain unofficial information within the categories described

above and naturally will wish to broadcast such information if it is releasable. To that end, both the New York and Washington news rooms are now staffed 24 hours a day, seven days a week, and arrangements have been made to check these reports with responsible governmental bureaus. This service is available not only to the news staffs of CBS owned and operated stations, but also to all affiliated stations.

[fol. 394] A most important part of our information continues to come from press associations. However, the very fact that any given piece of news is carried by a press association whose editors also have exercised their judgment before releasing it, does not necessarily mean that Columbia considers the item broadcastable. In other words, all news dispatches should be assayed by Columbia's news editors despite the fact that they already have survived previous judgments.

Now to examine the subject of eyewitness descriptions of air raids when and as they may occur. It is conceivable that an invading plane might carry a receiver purely in the hope that some station would be broadcasting eyewitness reports of the damage inflicted. In that event, any announcer who gave overly specific information regarding damage would be giving information of great value to the enemy. Thus, all announcers and reporters are instructed to bear constantly in mind the dangers of precise descriptive material. It would be far better to withhold one's exact location and say, for instance, "over to my left a big business building appears to have been hit by a bomb" rather than "the First National Bank Building next door to the roof on which I am standing has just been hit".

All air alarms should be handled with considerable care. On the whole, it is advisable not to put out any information regarding alarms until after the all-clear has been sounded or it develops that an actual raid is in progress. To tell in a news period that a certain city is having an air raid alarm will merely succeed in creating fear and panic and will doubtless lead to a complete swamping of long distance telephone facilities by listeners anxious to reassure themselves regarding the safety of friends and relatives in that city. It would be far better to wait and see if the alarm pre-

[fol. 395] ceded an actual raid or if the all-quiet signal is given before any reference is made to the alarm.

More than ever before, a calm and unexcited demeanor at the microphone is essential. Naturally, there should be variations in tempo according to the nature of the news. However, all announcers should try to keep a sense either of foreboding or exultation out of their voices and should keep to as factual a tone as possible no matter what the news. It should be remembered at all times that in warfare it is rare that a single reverse or triumph is decisive. Accordingly, no item should be broadcast so as to cause either exaggerated optimism or create defeatism and despair.

Commercial news broadcast must be watched particularly to prevent news phrases such as "bulletin" and "flash" to be used for purposes of advertising.

It is now, of course, much more important than ever not to permit distortion or over-emphasis of the news through improper dramatization or improper sound effects in connection with news broadcasts. Particularly, of course, there should be no use of sirens or other sound effects which might be construed as air-raid alarms or alert signals.

It is necessary to maintain a constant vigil over your news machines and studios during all hours of operation. [fol. 396] It is of prime importance not to permit any stranger to enter the news room or studio at or near the time of broadcast. Run the risk of being thought rude because you question visitors unknown to you rather than permit any possibility of an unauthorized broadcast.

Similarly, you should not accept any telephone requests for announcements without being certain of your informant. If there is any doubt in your mind take his telephone number, verify it and call him back.

From time to time as different conditions develop that can not now be foreseen, we intend to issue supplements to this memorandum. They will be sent to every CBS news editor, writer, reporter, announcer and analyst, all of whom are now war correspondents just as much as if they actually were at headquarters near the front lines. The important thing to all of us is that we build—and keep on building—public confidence in our news. That confidence should prove a valuable machine tool in the production of victory.

Paul W. White, Director of News Broadcasts.

[fols. 397-400] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF TELFORD TAYLOR IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

DISTRICT OF COLUMBIA, ss:

Telford Taylor, being duly sworn says:

(1) That he is the General Counsel of the Federal Communications Commission and as such is familiar with the Commission's proceedings taken under Order No. 37, Docket No. 5060.

(2) The said proceedings are as set forth in affiant's affidavit annexed to defendants' Motions to Dismiss the Complaint, or in the Alternative, for Summary Judgment, dated November 5, 1941.

(3) A certified copy of said proceedings has heretofore been filed with this Court in conjunction with defendants' Motions to Dismiss the Complaint, or in the Alternative, for Summary Judgment. It is incorporated herein by reference as Exhibit A.

(4) Affiant submits that Exhibit A is relevant on the issues sought to be raised by plaintiff's Motion for Preliminary Injunction and shows that said Motion should not be granted.

(Signed) Telford Taylor.

Subscribed to and sworn before me this — day of December, 1941. —— —— Notary Public.

[fol. 401] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF FRED WEBER, GENERAL MANAGER OF MUTUAL BROADCASTING SYSTEM, INC., IN OPPOSITION TO MOTIONS FOR PRELIMINARY INJUNCTION

STATE OF NEW YORK,
County of New York, ss:

Fred Weber, first being duly sworn, on oath deposes and says:

I

Affiant

Affiant is, and since the organization of Mutual in the fall of 1934 has been, in the employ of Mutual Broadcasting System, Inc. (herein referred to as "Mutual"), with the title of coordinator until 1936, and since then with the title [fol. 402] of general manager. Affiant is, and since the outset has been, a member of the Board of Directors of Mutual. Subject to the authority of the Board of Directors and the corporate officers of Mutual, none of whom (except the auditor) is paid any salary or other compensation by Mutual, affiant has at all times been, and is, the principal executive officer of Mutual, with active duties ranging over the entire field of Mutual's activities and operations. From 1926 to 1933 affiant was in the employ of plaintiff, National Broadcasting Company, Inc., serving successively in the commercial engineering, stations relations, and sales departments of that company. In 1933 affiant became vice-president and general manager of American Broadcasting System, a company which was organized in that year and which for a period of six months attempted without success to operate a national network. By reason of his past and present experience and duties, affiant is thoroughly familiar with the business of network broadcasting, embracing, and with particular reference to, its competitive aspects, including present and past efforts, practices, and policies of the several national network organizations, in competing with each other in the sale of time to advertising agencies, advertisers, and others, and in securing desirable

independently-owned broadcasting stations located in cities throughout the United States and elsewhere in North America to serve as network affiliates and as outlets for the broadcasting of network programs. Affiant appeared as a witness in behalf of Mutual in the proceedings before the Commission now under review (see transcript of record, pages 5116-5230 and 8249-8298) and actively participated in the preparation of exhibits and generally of Mutual's presentation before the Commission. Affiant also testified in behalf of Mutual at the hearing before the Senate Committee on Interstate Commerce on the so-called White Resolution (S. Res. 113) in June, 1941, on the subject-matter of the Commission's order now before this Court. Affiant has read and is familiar with the contents of the affidavits of Niles Trammell, William S. Paley and others heretofore filed with this [fol. 403] Court in support of the motions of plaintiffs National Broadcasting Company, Inc., and Columbia Broadcasting System, Inc. (hereinafter referred to as National and Columbia) for temporary injunction and temporary restraining order, and makes this affidavit in opposition to said motions.

II

Mutual Broadcasting System, Inc.

1. *Corporate organization.* Mutual is an Illinois corporation organized October 29, 1934, with its principal office in Chicago, Illinois. The facts with respect to its history, business, and corporate organization from the date of its incorporation are correctly set forth in the Commission's Report on Chain Broadcasting of May 2, 1941 (at pages 26 to 28) as of that date. Mutual has outstanding a total of 99 shares of common stock (out of an authorized total of 500 shares of common stock, there being no other class of stock), held by seven stockholders, each of whom (with the exception of Colonial, noted below) directly owns and operates one or more broadcast stations, and two of whom (Colonial and Don Lee) operate regional networks, as follows:

Shareholder	Number of Shares	Call Letters of Station or Stations	Location of Station
WGN, Inc.	25	WGN	Chicago, Ill.
Bamberger Broadcasting Service, Inc.	25	WOR	New York, N. Y.
Don Lee Broadcasting Co.	25	KHJ	Los Angeles, Cal.
		KFRC	San Francisco, Cal.
		KGB	San Diego, Cal.
		KDB	Santa Barbara, Cal.
Colonial Network, Inc.*	6	WAAB	Boston, Mass.
		WNAC	Boston, Mass.
		WEAN	Providence, R. I.
		WICC	Bridgeport, Conn.
United Broadcasting Co.	6	WHK	Cleveland, O.
		WCLE	Cleveland, O.
		WHKC	Columbus, O.
Cincinnati Times-Star Co.	6	WKRC	Cincinnati, O.
Western Ontario Broadcasting Co., Ltd.	6	CKLW	Windsor, Canada (in the Detroit area)

*Colonial Network, Inc., is not the licensee of the four stations set opposite its name. The licensee of these stations is Yankee Network, Inc., a corporation owned by the same interests.

[fol. 404] Steps have been taken as a result of which one or more of four of the foregoing (Colonial, United, Western Ontario, and Cincinnati Times-Star) may have their shareholdings increased from 6 shares to 25 shares each (the matter being at present in process of negotiation and study), and four other concerns will or may be added to the list of shareholders, with either 6 shares or 25 shares each, owning and operating broadcast stations affiliated with Mutual as follows:

Prospective Shareholder	Call Letters of Station or Stations	Location of Station
Pennsylvania Broadcasting Co.	WIP	Philadelphia, Pa.
WCAE, Inc.	WCAE	Pittsburgh, Pa.
Baltimore Radio Show, Inc.	WFBR	Baltimore, Md.
Buffalo Broadcasting Corporation	WGR	Buffalo, N. Y.

Mutual has a Board of Directors with nine members, based on representation of the shareholders in proportion to their shareholdings, and also including affiant. Pursuant to its cooperative purposes and character, and to insure a fair representation of the interests and points of view of its shareholders and affiliates, as well as of the various communities and sections of the United States, Mutual, in addition to the representation of its shareholders on its Board of Directors, maintains an Operating Board composed of rep-

resentatives of all its present and prospective shareholders and also two representatives of affiliates other than shareholders.

2. *Sources of revenue.* Mutual's expenses of operation are met through funds derived (a) from commissions retained by Mutual out of sums received from advertisers and others for use of time over the stations constituting the Mutual network, together with specific contributions from shareholders and affiliates for wire-line expenses, and (b) from contributions from Mutual's shareholders fixed in accordance with contracts between them and Mutual.

[fol. 405] III

Mutual Network Operations

1. *General scope and character.* Like its older competitors, National and Columbia, Mutual is engaged in the operation, and in performing all the functions, of a national network organization, both within the definition accepted by the Commission in its Report and within the definition generally accepted in the industry and according to popular usage. Like said competitors, Mutual is engaged in supplying a daily network program service consisting of both commercial and sustaining programs, totalling over 112 hours a week over a system of telephone wire-lines to broadcast stations scattered over a large part of the United States. In addition, this program service is supplied continuously to one station in Canada, is made available, and to a substantial extent is used by, many other stations in Canada, and in part, is supplied to stations in Hawaii by radio.

2. *Broadcast stations affiliated with Mutual.* Beginning in the fall of 1934 with an association of four broadcast stations located in New York, Chicago, Detroit, and Cincinnati, and expanding by gradual steps into a network of national scope and character, Mutual now has (as of November 1, 1941) a total of 199 broadcast stations in the United States, Canada, Alaska and Hawaii. A correct list of these stations, together with data as to the power, frequency and hours of operation of the stations, the cities in which they are located and the population thereof, and their primary affiliations, if any, with National and Columbia, appears in

Appendix A, attached hereto. This total includes stations owned by its shareholders, stations affiliated with certain regional networks which in turn are either shareholders of Mutual or are affiliated with it, and other independently-owned stations not falling within either classification. While the list of affiliated stations appears large, actually, in terms of effective use as outlets for network programs, [fol. 406] the network is under severe handicaps. These are due primarily to the fact that, as hereafter more fully appears, the restrictive provisions in the contracts between National and Columbia, condemned in the Commission's Report and forbidden by the Regulations now under review, completely bar Mutual from many important cities and markets, and entirely or largely bar Mutual during the more desirable broadcasting hours from many other important cities and markets, or make Mutual's access thereto subject to such conditions and uncertainties as to burden it with a heavy competitive disadvantage. In addition, as appears in Appendix A, Mutual's list of affiliated stations contains relatively few stations of high or medium power with large coverage; it is largely made up of stations of low power and limited coverage. Many of them are in smaller cities which Mutual's competitors have passed over. In a number of instances groups of several such stations are necessary to furnish coverage even partially approaching that of single stations of larger power affiliated with either of said competitors. Appendix B, attached hereto, contains a comparison of the stations affiliated with each of the four national networks in these respects.

3. *Wire-lines for transmission of network programs.* Like its said competitors, Mutual maintains an extensive and virtually nationwide system of telephone wire-lines suitable and continuously available for the transmission of network programs from the places of origination to the stations constituting the network, the total mileage of said circuits being approximately 15,000 miles, at an annual cost of $1,200,000. These wire-lines are, for the most part, leased directly from the telephone company by Mutual but, in some instances, are secured by virtue of arrangements between Mutual and certain of its shareholders and affiliates who, in turn, lease the wire-lines from the telephone company. Mutual's wire-line system compares favorably with the wire-line systems of National and Columbia in

[fol. 407] mileage and costs [1] and, to the extent that it is less, it is due somewhat to the fact that Mutual is a younger network but more to the effect of the restrictive provisions in the National and Columbia contracts barring Mutual from many communities and regions. In addition to its regular wire-line system, whenever necessary or desirable, Mutual arranges for additional circuits on a temporary basis to supply to the network programs originating at points not on the network, and similarly for transmission by radio or wire to the United States of programs originating in foreign countries for use over its network.

4. *Mutual's network program service—general.* Like its said competitors, Mutual supplies a network program service, consisting of both commercial and sustaining programs, to its affiliated stations. This service averages not less than 16 hours daily or a total of over 112 hours weekly. Frequently, additional hours of program service are supplied, including, on some occasions, service throughout the entire 24 hours of the day for the covering of events of major importance. The network program service thus supplied by Mutual is substantially the same in continuous character, content, quantity, quality, and expense of production as the network program services supplied by National and Columbia to their respective affiliates, differing only as (but not to the extent that) would be naturally expected of a younger organization having a smaller volume of business and suffering from the competitive handicaps imposed by National and Columbia's restrictive contracts.

5. *Commercial network programs.* Like its said competitors, Mutual is engaged in selling time on the stations constituting its network to advertisers, usually through advertising agencies (in most instances through a sales organization maintained by Mutual but, in some instances, [fol. 408] through sales organizations maintained by its

---

[1] According to Trammell's affidavit, page 13, "NBC's wireline expenses in 1940 aggregated in excess of $3,600,000" for *two* national networks. According to Paley's affidavit, page 9, the cost is "over $2,000,000 a year." Both these figures apparently include the cost of special, local, occasional or temporary lines in addition to those used regularly as part of the network systems.

shareholders or affiliates), for commercial network programs, to be supplied over the Mutual telephone wire-line circuits to as many of the stations as the advertiser can be persuaded to pay for. Because Mutual is a younger network, and more particularly because of the obstacles created by National's and Columbia's restrictive contracts, Mutual has not been able to, and does not provide, as great a volume of commercial network programs to its affiliated stations as do its said competitors, but there is otherwise no substantial difference in the commercial network program service supplied by Mutual and that supplied by its said competitors. As is the case with the latter, and in substantially the same manner, most of Mutual's commercial network programs are largely produced and paid for by the advertising agency and not by the network organization. Those not so produced are, in the case of Mutual, produced principally at the stations and by the staffs and facilities of Mutual's shareholders, chiefly at New York, Chicago, and Los Angeles, in substantially the same manner, and with the same results, quality, and effects, as those produced at the so-called key stations of said competitors.

6. *Sustaining network programs.* Like its said competitors, Mutual is engaged in supplying a sustaining program service to its affiliated stations during hours not occupied by commercial network programs. This sustaining program service exceeds 84 hours weekly and consists, in general, of the same character of cultural, educational, religious and public service programs as those supplied by its said competitors, and differs only in that (1) because of its smaller volume of commercial network programs Mutual furnishes a greater volume of sustaining network programs in terms of hours per week than do its competitors, and (2) because, with certain exceptions (consisting principally of broadcasts of news and special events originating in foreign countries), such sustaining programs are produced not by Mutual as a corporate entity but by its shareholders [fol. 409] and affiliates, principally those at New York, Chicago and Los Angeles, but also, to a substantial extent, by its shareholders and affiliates elsewhere. The selection of sustaining programs to be supplied to the network is made by Mutual through a competent staff by choosing the best from all such programs broadcast or proposed to be broadcast by its shareholders and affiliates. The actual annual

cost of production of such sustaining programs compares favorably with the sustaining program costs of National and Columbia.[2] In the production of sustaining programs, the studios, staffs and equipment of Mutual's principal shareholders serve substantially the same purposes and perform substantially the same functions as the so-called key stations of its competitors.[3] The Mutual method of supplying sustaining programs has several recognized and demonstrated advantages in that (1) it encourages shareholders and affiliates, with stations in many parts of the country, to produce good sustaining programs in the expectation that they will be accepted on the network and broadcast to a nation-wide audience, with appropriate credit in each instance to the station and the locality originating the program, instead of having the function of providing sustaining programs appropriated entirely by the network organizations,[4] (2) through the Mutual system of compensation to stations hereinafter described, funds are provided to shareholders and affiliates for this purpose instead of [fol. 410] being retained by the network corporation,[5] (3)

[2] According to Trammell's affidavit, page 15, National's *two* national networks, the Red and the Blue, "required the expenditure of more than $3,000,000 for talent and material alone." According to Paley's affidavit (p. 10) "In 1940 alone, CBS expended in excess of $5,000,000 on sustaining programs." This latter figure, however, includes an arbitrary allocation of Columbia's overhead, administrative expenses, wire-line rentals, etc. The cost of producing simply those of Mutual's sustaining programs (in terms of talent and material alone) which originate at WOR, New York, WGN, Chicago, and KHJ, Los Angeles, exceeds $1,250,000 annually and, when the cost of sustaining programs at other points is added, substantially exceeds this figure.

[3] It is to be noted that at one of the principal points of program production, Los Angeles, National does not own or operate any station.

[4] Mutual's programs originate at an average of not less than 18 different cities each week (Transcript of Record p. 5267).

[5] As stated in Paley's affidavit (p. 5), "The quality of sustaining programs can be improved by the individual station when its revenues from advertising increase."

the public is provided with a highly desirable diversity of points of program origination, and (4) the tendency toward undue concentration of talent and facilities for the production of programs in two or three large cities is materially neutralized. The excellent and varied character of Mutual's sustaining program service, provided in this manner, appears from the listings of regular sustaining features supplied over its networks and by the fact that in several instances where a station is or has been affiliated with both National's Blue Network and the Mutual network, the affiliate has frequently taken more hours of the Mutual sustaining service than it has of National's sustaining service. Statements and insinuations disparaging either the quantity or quality of this service, such as those appearing in Mr. Paley's affidavit (at pages 6-8, 29-30) and Mr. Trammell's affidavit (at page 7), are simply contrary to well-known or easily ascertainable facts.

7. *Ownership of stations, studio facilities, etc.* Unlike its said competitors, Mutual, as such, does not own or operate any broadcast station. As appears from what has already been stated, however, the broadcast stations of certain of its shareholders, principally those in New York, Chicago, and Los Angeles, but to some extent also the broadcast stations of the other shareholders and of certain of Mutual's affiliates (including its affiliate WOL at Washington, D. C.) serve substantially the same purposes and perform substantially the same functions as the so-called key stations of National and Columbia,[6] so far as they are either necessary or desirable for successful network operation. [fol. 411] The stations which serve such purposes for Mutual have elaborate studios in buildings specially built

[6] It is to be noted, for example, that National does not own or operate a station at one of the principal production points, i.e., Los Angeles, and that National and Columbia each own and operate stations at cities in which the other does not own or operate a station (e.g., at Cleveland, St. Louis, Minneapolis, Charlotte, Denver, and San Francisco). It is to be also noted that, at each of their stations, including the so-called key stations, both National and Columbia sell substantial amounts of time for local or national spot commercial programs and, in the periods thus sold, do not broadcast their excellent sustaining programs.

or adapted for the purpose, maintain competent engineering staffs, and maintain ample facilities for the production of programs, which compare favorably to those of National's and Columbia's so-called key stations, and, in some instances and in some respects, are superior thereto. Charges such as those made in Mr. Paley's affidavit (pp. 7-8, 30), that

"Mutual has no studios, maintains no engineering department, neither owns nor maintains any facilities for the production of programs and does not originate or produce a network program service such as is maintained by CBS and NBC"

apply only to Mutual as a separate corporate entity and are distinctly untrue of Mutual in its operation as a network.

8. *Basis of compensation to stations.* Unlike its competitors, Mutual has not attempted, and does not attempt, to fix, by contract or otherwise, the rates to be charged advertisers and others for the use of time over stations constituting its network. The rates charged by Mutual are simply the sum total of the rates of the stations used, save only in the case of certain volume discounts, but even in such case the discounts are also based on the stations' rates. Of the sums received from advertisers and others, Mutual retains a commission determined in advance by contract between it and the affiliate, which in the normal case is either large enough to include, or is supplemented by, the affiliate's share of the cost of wire-lines to connect it with the Mutual system, and, in the case of shareholders, Mutual also retains each shareholder's agreed contribution toward its expenses of operation. Because of this basis of compensation, Mutual, on the whole, pays to its affiliates a larger proportion of the sums received from advertisers for the use of the affiliates' stations than is paid by National and Columbia, although, because of its smaller total [fol. 412] volume of business, the actual total sum paid to its affiliates is, in most instances, less.

9. *Mutual's contracts with affiliates.* Prior to February 1, 1940, Mutual's contracts with its affiliates (with the exception of a network exclusivity provision with one shareholder and territorial exclusivity provisions with the same shareholder and a few affiliates) did not contain provi-

sions contravening the Commission's Regulations, either in their original form as adopted May 2, 1941, or as amended October 11, 1941. Since February 1, 1940, as is more particularly set forth in the Commission's Report (see particularly pages 35-37) and for the reasons therein stated, Mutual's contracts with its shareholders, its prospective shareholders, and one or two of its other affiliates have contained provisions of exclusivity and of exclusive time-options (from 3¼ to 4¼ specified hours on week days and 6 hours on Sundays) which contravene said Regulations, but the contracts provide that these clauses shall lapse if the Commission prohibits them, or if the other national networks voluntarily abandon them and, at the time the contracts were entered into, Mutual advised the Commission of the fact, of the reasons therefor, and of its willingness and desire to abandon them in the event such Regulations should be adopted. Immediately after the Commission's order of May 2, 1941, Mutual prepared a contract to conform with the Regulations in their original form and, on submission thereof to the Commission, secured the Commission's informal approval on June 19, 1941. A copy of this contract appears in the printed Hearings on S. Res. 113 at pages 565-9. Had it not been for the delays thereafter in putting the Regulations into effect, this contract would have been forthwith submitted by Mutual to all its shareholders and affiliates and, as affiant is informed and believes, would have been executed by them and would now be in full force and effect. Among the provisions of the contract, thus informally approved by the Commission, were the following:

[fol. 413] "2. Mutual and the Broadcaster will each publicize the Station as the regular Mutual outlet in the city in which the station is located. The station shall have the right to the first call on Mutual network commercial and sustaining programs in said city and Mutual shall not offer any series of programs or single program (not a part of a series) to any other radio station located in said city unless said series of programs or single program has been offered to the Broadcaster for broadcasting through the Station under this contract and the Broadcaster shall have failed or refused to accept such program or programs within forty-eight (48) hours after Mutual's offer. In the

case of a commercial program or a series of commercial programs:

"(a) If the Broadcaster is unable to clear the required period or periods of time on the station for such program or programs but notifies Mutual within said 48 hours that the Broadcaster can clear a mutually satisfactory substitute period or periods and is able and willing to broadcast the program or programs by means of the off-the-line recordings (made by the Broadcaster without cost to Mutual or the advertiser) during such substitute period or periods. Mutual will accept such substitute period or periods, unless the advertiser is unwilling to accept such broadcasting by the Station by means of off-the-line recordings during such substitute period or periods, it being understood that Mutual is not obligated to require the advertiser to accept such delayed broadcasting; and

"(b) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs scheduled to run for 13 weeks or more, or a series of separable programs, but notifies Mutual within said 48 hours that the Broadcaster will clear said periods of time upon a specified date not later than four (4) weeks after the commencement of the series of programs, Mutual will contract for such periods of time on the Station as of the specified date upon which the Broadcaster is able to clear such periods, unless the advertiser refuses to accept such postponement of broadcasting on the station.

"If the Broadcaster fails or refuses to accept said program or programs or if the Broadcaster is unable to clear the required period or periods of time and Mutual is unable [fol. 414] to persuade the advertiser to use a substitute period or periods or to postpone the commencement of such programs on the Station, as provided in the preceding subparagraph, Mutual may contract with any other station located in said city for the broadcasting of said commercial program or programs. In the case of a single sustaining program or series of sustaining programs:

"(a) If the Broadcaster is unable to clear the required period or periods of time for such program or programs but notifies Mutual that the Broadcaster will broadcast the program or programs by transcription at a mutually satisfactory substitute period or periods, Mutual will not offer

said program or programs to any other station in said city; and

"(b) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs, Mutual, in offering said series of programs to any other station in said city, will offer said series subject to recapture by the Station on one (1) week's notice to Mutual. It is understood, however, that notwithstanding the foregoing, Mutual may make available to any other station in said city special sustaining programs of great public importance (such as, but not limited to, addresses of the President of the United States.)"

On October 31, 1941, affiant sent to each of Mutual's shareholders and prospective shareholders a letter, a copy of which is attached hereto as Appendix C, and an informal interim agreement, a copy of which is attached hereto as Appendix D. The last-mentioned agreement was assented to by all of its said shareholders and prospective shareholders and Mutual is now operating thereunder without experiencing any difficulty or inconvenience by reason of any provision based on, or required by, the Regulations. Shortly thereafter, Mutual completed preparation of another contract to conform to the amended Regulations of October 11, 1941, a copy of which is attached hereto as Appendix E. Had it not been for subsequent delays in the effective date of the amended Regulations, due to the mo- [fol. 415] tions of plaintiffs now under consideration and to the stipulation between plaintiffs and the Commission, this contract would already have been submitted to Mutual's shareholders and affiliates and, as affiant is informed and believes, would have been executed by them and would now be in full force and effect.

IV

Mutual's Attempts to Secure Interim Relief in the Proceedings Before the Commission

1. *Initiation of the proceedings.* As stated in the Commission's Report (page 1), the proceedings before the Commission commenced with the Commission's Order No. 37, adopted March 18, 1938. Neither Mutual, nor, so far as is known to affiant, any officer, employee or representative of Mutual had made any complaint to the Commission

on the subject-matter of the proceedings, or had taken any step which led or had any part in leading the Commission to initiate the proceedings.

2. *Participation in the hearing.* As was the case of its competitors, pursuant to notice by, and request from, the Commission, Mutual entered its appearance and thereafter presented evidence before the Committee in charge of the hearing. Its witnesses (including affiant), to the best of their ability, produced the facts and information called for by the Commission's notice or requested by its counsel. The evidence presented in behalf of Mutual appears principally at pages 4845 to 5428 (February 7 to 14, 1939) and pages 8249 to 8298 (April 18, 1939) of the transcript of record, and in Exhibits Nos. 368 to 435. The hearing extended from November 14, 1938 to May 19, 1939.

3. *Mutual's motion of April 19, 1939.* The injuries to Mutual and its affiliated stations resulting from the restrictive contracts of National and Columbia having steadily persisted and increased during the course of the hearing, and the threatened future injuries appearing likely to become [fol. 416] greatly aggravated through the increasing activities of National and Columbia (both of which organizations were, in apparent defiance and attempted nullification of the Commission's power and jurisdiction, busily engaged in attempting to secure long-term renewals of their restrictive contracts with affiliates), Mutual, on April 19, 1939, sought interim relief from the Commission through a motion the nature of which, and the arguments presented in support and in opposition, appear at pages 8454-8463 of the transcript of record. In substance, the motion sought the immediate adoption by the Commission of a regulation which would have forbidden licensees to enter into affiliation contracts with network organizations, or into any renewal or extension of existing affiliation contracts, for a period extending beyond December 31, 1940, at least in cities having less than four stations with comparable facilities (R. 8457, 8459). The motion was taken under advisement by the Committee (R. 8463).

4. *Renewal of the motion in July, 1939.* No action having been taken on said motion, on July 6, 1939 Mutual filed a formal motion in writing asking that the Committee recommend to the Commission at an early date the adoption of a regulation in substance as follows:

"No licensee of a standard broadcast station shall enter into a contract, agreement or other arrangement with any network organization covering or dealing with the affiliation of such licensee's station with the network organization, or into any renewal or extension of any such existing contract, agreement or other arrangement, or exercise any option or other privilege contained in any such existing contract, agreement, or other arrangement for renewal or extension thereof, for a period extending beyond . . .",

suggesting that the date to be specified in the foregoing be such as to allow sufficient time for the conclusion of the proceedings and the issuance of such regulations as might result therefrom. On July 14, 1939, Mutual filed a supple- [fol. 417] ment to said motion incorporating facts and events occurring since the filing of the motion. As appears in greater detail in said motion and supplement as contained in the record, National was in the process of obtaining, and did obtain, an exclusive and time-option contract with respect to WLW, a 50 kw. clear channel station which had theretofore been free of such restrictions and had been Mutual's affiliate in Cincinnati and one of its basic and most important outlets. Mutual was thereafter completely excluded from said station. The contract was secured by National, as affiant is informed and believes, with the primary intent and purpose of crippling Mutual as a competitor[7] by depriving it of access to one of its most important outlets. No action on said motion or supplement was taken by either the Committee or the Commission.

5. *Renewal of the motion on July 17, 1940.* The Committee having made its report to the Commission on June 12, 1940, and the injuries to Mutual resulting from the restrictive contracts having persisted and increased, Mutual renewed its motion formally and in writing on July 17, 1940, as appears more fully from the record. No action, however, was taken by the Commission on the motion further than to announce in a release issued July 26, 1940 that the

---

[7] Thereafter, after sale by Columbia of a station (WKRC), theretofore owned and operated by it in Cincinnati, to Cincinnati Times-Star Co., Mutual obtained an outlet in that city.

advisability of adopting the temporary regulation requested by Mutual was one of the subjects to which briefs should be directed. No temporary or interim relief having been granted to Mutual, the Commission on May 2, 1941, over 3 years after initiating the proceedings, adopted the Regulations which, as later amended on October 11, 1941, are now sought to be further delayed from going into force and effect.

[fol. 418] V

Irreparable Injury to Mutual Through Maintenance of Restrictive Contracts

1. *The contract provisions involved.* The provisions in contracts between National and Columbia and their respective affiliates which have caused, are now causing, and will cause great and, affiant believes, irreparable injury to Mutual are those forbidden by Regulations 3.101 and 3.104 of the Commission, as amended, and, to an incidental but nonetheless important extent, those forbidden by Regulation 3.103. These contract provisions, generally described, consist in

a) provisions by which the affiliate agrees not to broadcast the programs of any other network organization;[*]

b) provisions by which the affiliate grants to the network organization an exclusive option, exercisable on 28 days'

---

[*] Such provisions are contained in virtually all contracts between Columbia and its affiliates and, at least until recently, have been contained in contracts between National and some 35 of its affiliates. From the fact, however, that all mention of the exclusivity clause is omitted from National's complaint (see par. 21 at p. 7 of the Complaint), that the form of affiliation contract attached to the Complaint as Exhibit A contains no such clause, and from the omission of Trammell's affidavit to mention or to justify such a clause, affiant is led to believe that National has abandoned the exclusivity feature. Affiant is informed that on or about December 4, 1941, National advised its affiliates that it has abandoned this feature of its contracts.

notice, either on all its hours of operation,[9] or on its more desirable hours in the morning, afternoon, and evening periods;[10] and

{fol. 419} c) provisions by which the term of such contracts is fixed at a period of 5 years or more.[11]

In addition, the ownership by National and Columbia of broadcast stations in certain communities, more particularly in two communities served by less than four full-time broadcast stations (covered by Regulation 3.106) has had the same restrictive effect, but, in order not to complicate the discussion, such ownership will not be separately treated in this affidavit.

2. *The limited number of broadcast stations in many cities.* While there are, as of November 1, 1941, 877 broadcast stations in licensed operation in the United States,[12] many of these stations are wholly or partly unsuitable or unavailable as network outlets, because of their non-commercial character, or because of restrictions on their hours

---

[9] Such provisions are contained in contracts between National and not less than 30 affiliates in the western part of the United States, including the Pacific Coast, and in contracts between Columbia and virtually all its affiliates. Beginning about 1937 Columbia has introduced an apparent limitation in its contracts which has since then been extended to most of them, namely, that the total amount of time per week upon which Columbia may exercise its option shall not exceed 50 "converted" hours (the equivalent of approximately 79 clock hours in actual practice, since 2 daytime hours are deemed the equivalent of one evening hour). Since the hours under option are not specified, however, the Columbia provision is the equivalent of an option on *all* the station's time until the maximum is reached.

[10] Such provisions are contained in practically all the remaining contracts between National and its affiliates, and cover the hours from 10 a. m. to 12 noon, from 3 p. m. to 6 p. m., from 7 p. m. to 7:30 p. m., and from 8 p. m. to 11 p. m.

[11] This is true of nearly all contracts between National and Columbia and their respective affiliates.

[12] In addition, as of November 1, 1941, construction permits were outstanding for 38 new stations.

of operation (e.g., stations required to close down at sunset or shortly thereafter), or because of inadequate coverage to serve the cities in which they are located (due to low power or undesirable frequency or interference), or because they are located in towns which are too small to be attractive to advertisers or are within areas served by four or more stations. There are only approximately 21 cities adequately served by 4 or more full-time broadcast stations. Of the remaining cities, approximately 24 are adequately served by 3 full-time broadcast stations; 59 are adequately served by 2 full-time broadcast stations; and, of cities having a population over 50,000, 44 are adequately served by only one full-time broadcast station. A list of cities classified according to the number of full time stations located therein and also according to the number of full time stations from which such cities receive adequate service is set forth in Appendix F, attached hereto. Many of the cities adequately served by only 3 full-time stations, [fol. 420] some of the cities adequately served by only 2 full-time stations, and a few of the cities adequately served by only 1 full-time station, are of large or substantial population, or are the centers of recognized trade areas, constituting attractive markets for national advertisers. Because of technical reasons having to do with the limited frequencies available for use by broadcast stations, and limitations on the extent to which two or more stations can operate simultaneously on the same or adjacent frequencies without undue interference, it is, generally speaking, impossible in the present or any immediately foreseeable future state of the art to provide additional full-time stations in such cities.

3. *Effect of contract provisions on network access to markets.* With four national networks in operation, the effect of the contract provisions above described is that in any city having less than four full-time stations, one (or more) of the networks is either entirely or largely barred from access for its program service to the city and its environs, and from offering coverage of the city and its environs to any national advertiser, depending on the type of restrictive provisions in effect with respect to the stations serving such city. Similarly, the listening public in any such city is either entirely or largely barred from access to the program services of such network or networks.

In actual practice, under existing contracts, there are 7 cities (shown in Appendix F) adequately served by only 3 full-time stations in which Mutual's only access is through stations primarily affiliated with National under contracts which, while not containing the exclusivity feature, contain option-time provisions covering most of the station's more desirable hours.[13] In such cities, Mutual's only access has been (a) to the less desirable hours not covered by option, or (b) to the hours covered by option not in actual present use by the network having the option but subject to use by that network on 28 days' notice. In 23 cities served [fol. 421] by only 2 full-time stations (shown in Appendix F), Mutual is effectively and as a practical matter denied access because of the restrictive provisions, and in 9 other such cities (likewise shown in Appendix F) Mutual's only access is subject to option-time provisions in favor of its competitors. For the most part, the cities and towns having only 1 full-time station rendering adequate coverage are smaller in population and are less important as markets, but they nevertheless include a fairly large number of important centres from which Mutual is completely barred.

4. *The national advertiser's interest in access to markets.* The commercial use of networks of national scope (such as those of National, Columbia, and Mutual) for sponsored programs is by national advertisers, that is, concerns having or desiring markets for their products or services generally throughout all or most of the country, and therefore interested in having their programs heard by as large a portion of the public as is possible, consistently with the amount of money available to them for radio advertising and the probable return therefrom. This interest naturally centers first on the larger cities, which, because of concentrations of population not only within their corporate limits but also in their environs and in the trade areas tributary to them, generally provide the larger audiences per station and are vital to any national advertising campaign. The interest extends, however, to medium-sized and, progressively, to smaller cities and their respective trade areas, until a point is reached where the prospective audience may be too small, in proportion to the outlay and prospective

[13] See footnote 10 above.

return, to attract the advertiser. It has been the experience of all networks (including Mutual), however, that as a sponsored program gains an audience in the larger markets and demonstrates its value to the advertiser, the advertiser seeks to extend the program to other and smaller markets, over a larger network of stations, and over a larger portion of the country. Thus, sponsored programs which at the outset were broadcast over comparatively few stations [fol. 422] in the larger cities and in only a portion of the country's area have almost regularly been extended so as to be broadcast over a nation-wide network. In addition to the foregoing, there are national advertisers who, because of the location of their dealers, distributors, jobbers, sales organizations, or retail stores, or because of regional differences in habits and in demand for particular products or services, or because of the advertising campaigns of competitors, require access to certain but not all of the smaller markets in addition to the larger markets.

5. *The national advertiser's interest in continuity of his sponsored program.* Contracts between network organizations and advertisers (usually through advertising agencies) for the use of a network of stations for the broadcasting of a sponsored program are customarily for a period of 52 weeks, cancellable at the end of any 13 weeks' period. It is the experience of all networks (including Mutual) that if use of the network has given satisfactory results and the advertiser's needs and desires with respect to continuous service and expansion are met, the great majority of such contracts are renewed from year to year for use of the same network on the same day, and at the same hour with the same, or an improved, character of program. A vital and usually determinative factor, however, in persuading an advertiser to enter such a contract with a particular network organization in the first instance, or to continue with and to renew such a contract thereafter, is the ability of the network organization to assure the advertiser of continued and uninterrupted regular broadcasting of his program over the stations which the advertiser has agreed to use, for the period of the contract and on the day and at the hour selected by the advertiser. The reasons for the importance of this factor include the following:

a) Most sponsored network programs entail large expenditures by the advertiser for talent and material used

in the production of such programs. This is made possible by the fact that, through the use of wire-line systems, the [fol. 423] same program can be transmitted for simultaneous broadcasting to the audiences of many stations, and therefore to a much larger public, with a correspondingly greater return to the advertiser, without any increase in the cost of producing the program. The loss of audience resulting from unavailability of access to a desired market, or from discontinuance of the program by any station on the network in such a market, means a corresponding diminution in the return to the advertiser for his outlay.

b) Any sponsored network program requires a substantial period of time (usually not less than eight weeks and frequently longer) before it acquires a regular audience and a goodwill with the public served by a particular station of a character satisfactory to the advertiser, and, once it has acquired such an audience and goodwill (which, in the case of any good program, increases with the length of the period of time during which the program is broadcast), the advertiser has a considerable investment therein which is lost if the station becomes unavailable and the advertiser is deprived of access to the market.

c) When a new network commercial program is about to be broadcast, or is being broadcast, it is the practice of the advertiser sponsoring the program to make large expenditures for promotional advertising in newspapers and other media to attract public attention to the program, and to take appropriate steps to inform his dealers, distributors, jobbers, sales organizations or retail stores in each community about the program and enlist their cooperation in promoting public interest therein by advertising and other means. The advertiser has a considerable investment resulting from such expenditures in each community, which is lost if the station in that community becomes unavailable and the advertiser is deprived of access to the market.

d) Most network commercial programs have a continuous and connected character, frequently having a nature and [fol. 424] importance corresponding to that of instalments in a serial story, or of sequels. In addition, a vital feature of successful radio advertising is consistent repetition at regular and scheduled intervals, known to and expected by

the public. Much of the value of such programs to the advertiser is in preserving a regular audience for such programs against interruption or discontinuance thereof, and against shifts in the day and hour for which they are scheduled. Particular hours in the day are more important to the advertiser than other hours, either because (as in the case of certain evening hours, such as 8 p. m. to 10:30 p. m.) there is a greater potential audience, or because some hours are more appropriate for a given type of program than other hours. Ordinarily, the advertiser has, at the outset, selected the best hours available for his purposes. If, by reason of a station's becoming unavailable at the scheduled hour, the advertiser is compelled to shift his program to another hour on the same station, he suffers serious disadvantages and loss of return on his expenditures because (1) the audience built up for the scheduled hour is dislocated and is temporarily and, to some extent, permanently lost (not infrequently to a competitor), and a new audience must be built up, with corresponding expenditures for promotion; (2) the hour to which the program is shifted (sometimes to the next day) is usually less desirable with respect to potential audiences, or appropriateness for the program, or timeliness, and may, in turn, likewise be subject to further shifting and repetition of the same experience; (3) when such shifts occur, the broadcasting of the program over the station involved must be done by transcription and, under the regulations of the Federal Communications Commission, must be announced as such, with a consequent and very real loss in the effectiveness of the program with the public as against a broadcasting of the program instantaneously at the time of performance by live talent; (4) the network commercial programs of one or more com- [fol. 425] petitors of the advertiser may, and frequently are, being broadcast over other stations (or the same station) in the same market without being subject to these disadvantages.

6. *Factors necessary to assure equal competitive opportunity for national networks.* In order to have equal opportunity in securing commercial network programs from national advertisers, a national network organization must be able to offer, on a footing substantially equal to that of its competitors, (a) access to the markets desired by such advertisers, and (b) assurance of the continued broadcasting

of the advertisers' programs at the desired and scheduled time in such markets.[14] Inability in either respect necessarily results in a preference for, and a choice by, national advertisers of other national network organizations not thus handicapped, both in originally placing their business and in continuing business already placed, even though in all other respects such advertisers may prefer the handicapped organization on its merits. Many cities are of such importance (including a number of cities adequately served by less than four full-time stations, from access to which Mutual is either completely barred, or is barred on a continuous basis during the more desirable hours, by the restrictive contracts of National and Columbia, as shown in Appendix F) that the inability of one network and the ability of a competing network to afford access thereto on a continuous basis to a single such city will usually determine the choice of the advertiser. Other cities (including a large number adequately served by less than four full-time stations, from which Mutual is either wholly or largely barred as aforesaid) are of sufficient importance so that, while such access to a single such city may not determine the advertiser's choice, access to two, three or a larger number of such cities, depending on their importance and their ap- [fol. 426] peal to the particular advertiser, will determine his choice. The choice by an advertiser of one network over another for such reasons results in loss of revenue for the latter network and its affiliates not only with respect to the markets to which the losing network does not have such access but also with respect to all other markets in which it does have such access, as well as a loss of prestige with both advertisers and advertising agencies. The handling and placing of nearly all national network advertising is controlled by a limited number of agencies. The appraisal and judgment of these agencies of the respective abilities

[14] As stated by Mr. Paley in his affidavit (pages 12-13):

"Nor will the advertiser embark upon the costly venture of a nationwide radio program series unless the relations between the network he selects and its affiliated stations are sufficiently stable so that he may reasonably expect to maintain his coverage and enjoy the cumulative fruits of his efforts to please the listening public and promote sales of his product."

of competing networks to afford the desired continuous access to markets is frequently a determining factor in the choice of networks and, by reason of their great interest and their continuous and competitive activities in the field, such agencies are intimately familiar with the facts and circumstances bearing on such access in connection with each network. In addition, there are several trade journals wholly or largely devoted to the broadcasting industry, including *Broadcasting, Variety* and *Radio Daily,* which circulate among all advertising agencies and, to a large extent, among national and prospective national advertisers, which trade journals regularly report, as items of news interest to their readers, the acquisition or loss of business by any national network organization, and frequently the reasons therefor, with corresponding enhancement or impairment of the prestige of the network involved, and with corresponding effect on its ability to retain existing business and to obtain further business.

7. *Competitive use of such factors by National and Columbia in representations to agencies and advertisers.* At all times since shortly after the organization of the Mutual network, and particularly since it became a nation-wide network, National and Columbia, in competing with Mutual for the business of national advertisers, have made, and have caused their salesmen, representatives, and agents to make, representations to advertising agencies and adver- [fol. 427] tisers that, because of their contracts with affiliates in markets adequately served by less than four full-time stations, needed or desired by the advertiser,

a) Mutual is unable to provide any access at all in certain of such markets, either at the outset or in case of expansion;

b) Mutual is unable to provide access on an assured continuous basis in a number of other of such markets during the more desirable hours, or the hours usually needed or desired by the advertiser;

c) Any such access as Mutual can obtain for a network commercial program in the class of markets last mentioned during the more desirable hours, or the hours usually needed or desired by the advertiser, will be subject to discontinuance or to shift on 28 days' notice at the demand of National or Columbia (as the case may be), with the at-

tendant inconveniences, resorts to transcriptions and less favorable hours, loss of investment and audience, and other disadvantages heretofore pointed out.[15]

[fol. 428] d) Advertisers who have used the Mutual network in the past have been subjected to such handicaps and disadvantages and, as a result, have left the Mutual network and have placed their business with National or Columbia.

Such representations have caused, and are continuing to cause, Mutual to lose the business of national advertisers who have placed their business with National and Columbia and who, as affiant is informed and believes, would otherwise have placed their business with Mutual. The situation has arisen much more frequently in Mutual's competition

---

[15] In certain instances, examples of which are pointed out below, this representation has been accompanied by specific threats on the part of National's Blue Network that all, or an important part, of the precise time desired by the advertiser on stations in such markets would be preempted by National under its option-time privileges for another specified advertiser who was ready and willing to use the time for a network commercial program over the Blue Network. The cities in which are located stations jointly affiliated with National or Columbia and Mutual, but in which Mutual's access is subject to the restrictive contract provisions in favor of National or Columbia, are as follows:

Cleveland, O.	Harrisburg, Pa.
Houston, Texas	Binghamton, N. Y.
Memphis, Tenn.	Evansville, Ind.
Birmingham, Ala.	Manchester, N. H.
Omaha, Neb.	Augusta, Ga.
Richmond, Va.	Cedar Rapids, Iowa
Jacksonville, Fla.	Lancaster, Pa.
Des Moines, Iowa	Corpus Christi, Texas
Salt Lake City, Utah.	York, Pa.
Bridgeport, Conn.	Columbia, S. C.
Tulsa, Okla.	Bangor, Me.
Spokane, Wash.	Weslaco, Texas
Charlotte, N. C.	Shenandoah, Iowa

In all but 3 instances, the stations in question are affiliated with National.

with National's Blue Network, than with National's Red Network or Columbia because National has been able to sell only a comparatively small amount of the time it has had under option over its Blue Network affiliated stations and such stations consequently have a much larger amount of time available during their more desirable hours for the programs of another network, and a much greater need for revenue and a corresponding desire and interest in having such use made of their time, than is true of most of the Red Network and Columbia affiliated stations. As is hereinafter set forth in detail National has, usually in the interest of its Blue Network, from time to time actually exercised its option-time privileges under its contracts with affiliates in markets such as those which have been described so as to force advertisers who were theretofore using the Mutual network to take their business and their programs from Mutual and to place them with National, either because the advertisers were blocked from further desired expansion for their programs, or because they were completely denied access to markets needed or desired by them, or because of having to shift their programs to delayed broadcasts by transcription. The result has, on occasions, been simply that, with respect to such markets, the same advertiser with the same program would continue the use of the same stations at the same hour, but to do so was forced in other markets to use National's Blue Network instead of the Mutual network. In addition to the representations above [fol. 429] described, National, in order to induce advertisers to use its Blue Network, (a) has given them the benefit of a system of large discounts made possible only by its very profitable operation of the Red Network, (b) has assured such advertisers that, if they will use the Blue Network, they will be given the benefit of the first opening of suitable time that develops on its Red Network, and (c) has given such advertisers the benefit of a combination of the better stations affiliated with both the Red and the Blue Networks, all of these being competitive advantages for National possible only because of its ownership and operation of two supposedly competing national networks.

8. *Representations with respect to effective date of the Commission's Regulations.* In addition to the representations summarized in the preceding paragraph, as affiant is informed and believes, National and Columbia are, and ever

since the Commission's Order of May 2, 1941, have been, making, and causing their salesmen, representatives and agents to make, representations to advertising agencies, to national advertisers, and to their affiliates, that, by reason of proceedings which they proposed to institute in court (including these pending proceedings), the Commission's Regulations would not go into effect in less than two or three years (if at all) and that during such period of time affiliates may safely enter into or renew contracts with National or Columbia containing provisions such as those forbidden by the Regulations, and national advertisers cannot place their business with Mutual without being subject to the hardships and inconveniences already described. As a result of such representations, coupled with the successful exercise by National of its option-time provisions within the past two months to its advantage and at the expense of Mutual, all as hereinafter more fully set forth, Mutual has lost business of vital importance to its continued success, and is immediately threatened with the loss of further such business, and, unless the Regulations are permitted to go into effect, affiant fears it will continue to lose such business to a point where its existence will be endangered.

[fol. 430] 9. *Current and past examples of loss of business by Mutual because of the restrictive contracts.* (a) *The Ballantine Program.* In June, 1941, after extensive efforts and outlay, Mutual secured, and entered into, a contract with J. Walter Thompson Company, one of the leading advertising agencies, acting in behalf of its client, Ballantine & Sons, brewers of ale and beer, for the broadcasting of a network commercial program over 77 stations affiliated with Mutual at the scheduled hour 9:30 p. m. to 10 p. m. (New York City time) on Friday nights, for the usual period of 52 weeks, commencing in September, 1941, cancelable on four weeks' advance notice at the end of any 13-week cycle. The program which was proposed to be broadcast, and which was thereafter broadcast, was of outstanding audience appeal and was of a character and quality of excellence such as to contribute greatly to the prestige of Mutual and its affiliates, with a heavy cost of production for the advertiser and featuring popular and well-known artists and talent such as Charles Laughton, Milton Berle, Shirley Ross, and Bob Crosby's Orchestra.

Included among the 77 stations were 14 in cities adequately served by less than four full-time stations. All 14

stations were (and are) affiliated with National under contracts containing network option-time clauses above described. The call letters, location and network affiliation (other than with Mutual) of these stations were and are as follows:

WHK	Cleveland	Blue Network
WTAG	Portland	Red "
WCSH	Worcester	Red "
WTIC	Hartford	Red "
WICC	Bridgeport	Blue "
WMFF	Plattsburg	Blue "
WGAL	Lancaster	Red and Blue Networks
WORK	York	Red and Blue "
WJHP	Jacksonville	Blue Network
WEAN	Providence	Blue "
WKBO	Harrisburg	Red and Blue "
WKAT	Miami	Blue Network
WLBZ	Bangor	Red and Blue "
WXYZ	Detroit	Blue Network

[fol. 431] It was necessary for the 14 stations to accept the Ballantine program subject to the exercise by National of its privilege under the network option-time provisions to preempt the time on 28 days' notice.

On or about September 15, 1941, 10 of the 14 stations notified Mutual they could not continue to broadcast the Ballantine program after October 10, 1941, at the scheduled hour (namely, from 9:30 to 10:00 p. m. on Friday evenings) because that time was subject to option by National and National had exercised its option for the broadcasting of a program sponsored by the Canada Dry Company. The stations advised Mutual that on and after October 10, 1941 the program would have to be broadcast by them through the use of transcriptions at a later hour (meaning another day in most instances), which substitute time, to be satisfactory to the advertiser (that is, in equally desirable hours), would necessarily be at an hour likewise subject to preemption by National on exercise of its option privileges. National's action in exercising its option worked to the injury of the 10 affiliates in that not only did they have to accept a lower basis of compensation from National than from Mutual but the Canada Dry program was for 25 min-

utes instead of 30 minutes, thus further reducing their compensation.[16]

On October 23, 1941 Mutual was notified in writing by J. Walter Thompson Company that the agency was canceling the Ballantine program effective after the broadcast on October 31, 1941. A copy of this letter and enclosure is attached hereto as Appendix G. Since the contract was binding for a 13-week period ending December 5, 1941, the agency offered to compensate Mutual for time from October 31, 1941 to December 5, 1941, without making use of the Mutual network if Mutual would not release the agency from its obligation. The amount thus to be paid to Mutual [fol. 432] was $27,711.75 for the five weeks involved, plus an additional $17,984.20, because of the inapplicability of the short rate, resulting from broadcasting only eight weeks instead of 52 weeks. This amount constituted approximately 16 per cent of the total amount that Ballantine would have been called upon to pay to Mutual under its contract for the 52-week period, and, in the absence of any rate concession made by National to the agency or the advertiser, is indicative of the value placed by them upon the continued and assured access which National was able to provide to the markets in question.

Prior to soliciting and procuring the Ballantine account, National had not accepted any beer or liquor advertising over either its Red or Blue Networks for several years, and had allowed it to be understood that it was its regular policy not to accept such advertising. To secure the Ballantine program, therefore, and to deprive Mutual thereof, National introduced a major change in its policy, at least for the Blue Network. On information and belief, affiant further states that, as an additional inducement to the advertising agency, National informed it that if Ballantine would make use of the Blue Network it would have the privilege of transferring to the Red Network as soon as time thereon should

---

[16] Affiant is informed and believes that the primary reason the Canada Dry Company scheduled its program with National rather than with Mutual was that Mutual could not assure continuous access to the markets served by these 14 stations at an hour acceptable to the advertiser, whereas National was in a position to do so.

become available and National should decide to accept such advertising on the Red Network.

On October 27, 1941, Mutual was advised by J. Walter Thompson Company, both orally and by letter, that the Ballantine program would continue over Mutual for the remainder of the 13-week period, thus rescinding the cancellation as of October 31, but canceling the program as of December 5, 1941. A copy of the letter and enclosure, both dated October 27, 1941, is attached hereto as Appendix H. Since that date the program has been discontinued on the Mutual network and has been broadcast over National's Blue Network. Mutual's loss of the program has entailed not only loss to it and to its affiliates of the very substantial revenue involved for the remainder of the original contract period and any renewals thereof which the agency and the [fol. 433] advertiser might otherwise have agreed to, but also the loss of a very important and popular program and of the audience resulting therefrom, as well as a corresponding loss of prestige among advertising agencies, advertisers, and actual or prospective affiliates. To illustrate the wide publicity attendant upon such an occurrence, affiant refers to news items appearing in the trade magazine *Broadcasting* for October 27, 1941, at page 50, and in the trade magazine *Variety* for October 29, 1941, at pages 31 and 38, copies of which are set forth in Appendix I.

(b) *The March of Time Program.* In June, 1941, Mutual entered upon negotiations with Time, Inc., publishers of *Time* Magazine, for the broadcasting over the Mutual network of a program known as "March of Time". This program had been formerly on the Columbia network, but had not been broadcast for some two years. Mutual was given to understand by the representatives of Time, Inc., that during the coming year the Mutual network would be used for the purpose. Thereupon, as affiant is informed and believes, officials of National proceeded directly to the representatives of Time, Inc., and told the latter, in substance, that if Time, Inc., placed its program on Mutual, National, through the exercise of its option privilege to preempt broadcasting time of affiliate stations, would see to it that the "March of Time" program would be either eliminated from stations in a number of important markets or, in the alternative, forced to delayed broadcasts by transcription. More specifically, as affiant is informed and believes, National's said officials represented that National had an order

from a concern known as the Clark Candy Company which could be applied to the precise half-hour in question (8:00 p. m. to 8:30 p. m. on Thursday nights) and that, after "March of Time" went to Mutual, the Clark Candy program would be used for the purpose of such elimination, but if the "March of Time" program would use National's Blue Network the Clark Candy program would be moved to, and scheduled on, the half-hour immediately following. [fol. 434] As the result of said representations by National officials, Time, Inc., purchased time on the Blue Network of National and has been using said network since early in October, 1941, and the Clark Candy program has been scheduled for the half-hour immediately following. National's scheduling of the program for Time, Inc., represented a distinct change in its theretofore publicly anounced policy against dramatization of war scenes and impersonations of world figures, as well as its policy against the use of recordings on network programs. In illustration of the publicity attendant upon the change of policy, affiant refers to a reprint from the trade magazine *Broadcasting*, October 13, 1941, page 66, a copy of which is attached hereto as Appendix J.

(c) *The Lucky Strike Program.* Approximately three years ago, Mutual secured the American Tobacco Company as sponsor for a regular weekly program advertising its product, Lucky Strike Cigarettes. The program was Kay Kyser's "College of Musical Knowledge," and had been previously broadcast over the Mutual network as a sustaining program. Because of the popularity of the program and its satisfactory return to the advertiser after a period of about 13 weeks, the advertiser desired to expand the program to reach additional markets but, because of the restrictive contracts of National and Columbia, Mutual was unable to meet the advertiser's needs. The advertiser thereupon discontinued use of Mutual and placed the program on National, over which it is still being broadcast under the same name and with the same general character. For the same reason, the advertiser transferred a program, "Melody Puzzles" from Mutual to National's Blue.

(d) *The "True or False" Program.* Shortly after Mutual's experience with the Lucky Strike program, Mutual secured the J. B. Williams Company as sponsor for a regular weekly program known as "True or False," at first

broadcast over a few stations and gradually expanding to more stations, including several also affiliated with National's Blue Network under restrictive contracts. Na- [fol. 435] tional thereafter exercised its option-time privileges to force such stations to broadcast another network commercial program in the time required for "True or False" and, as a result of the hardships and inconveniences caused thereby, the advertiser discontinued the program on Mutual and transferred it to National's Blue Network, over which network the program has ever since been, and is still being, broadcast, on the same evening (Monday) every week.

(e) *The "Don't You Believe It" Program.* In 1939, because of the exploitation by National of said restrictive contract provisions to prevent expansion of the program to other stations and to force stations already broadcasting the program to discontinue or shift it to a delayed broadcast by transcription, Mutual lost the program "Don't You Believe It," sponsored by P. Lorillard & Sons, to National's Blue Network.

(f) *The "Famous Jury Trials" Program.* In 1938-1939, because of the exploitation by National of said restrictive contract provisions to force stations already broadcasting the program to discontinue or shift it, Mutual lost the program "Famous Jury Trials," sponsored by Mennen's. The sponsor went to a combination of Blue and Red stations.

(g) *The Phillip Morris Program.* In 1939, because of Mutual's inability to provide expansion into additional markets on an assured continuous basis because of National's restrictive contracts, Mutual lost a program sponsored by Phillip Morris & Company, and theretofore broadcast over the Mutual network, to National's Blue Network.

(h) *The "Goodwill Hour" Program.* Early in 1940, because of the exploitation by National of its restrictive contract provisions to force stations to discontinue or shift the program, Mutual lost the program "Goodwill Hour," previously broadcast over its network, to National's Blue Network, over which network the same program is still being broadcast regularly on Sunday evenings.

[fol. 436] (i) *General.* The foregoing, while including the principal examples of network commercial programs known by affiant to have been lost by Mutual because of National

and Columbia's said restrictive contract provisions, is by no means a complete list. Throughout its existence, Mutual has regularly competed with National and Columbia for each new or prospective national advertiser, as far as known to it, and in the course of this competition, a number of such advertisers have placed their business with National or Columbia under circumstances which, so far as known to affiant, indicate that factors based on the restrictive contract provisions either were determinative or contributed substantially to the result.

10. *Apprehended loss of further business by Mutual.* (a) *The Coca-Cola Company Program.* In September, 1941, Mutual entered into a contract with the D'Arcy Advertising Agency, acting in behalf of its client, Coca-Cola Company, for the broadcasting of a commercial network program over 118 stations affiliated with Mutual five nights a week from 10:15 to 10:30 p. m., and the sixth night from 10:15 to 10:45 p. m. This contract was secured after long and arduous negotiations in competition with National and Columbia, during which National sought to persuade the agency to use National's Blue Network on the representation that if Mutual were used the program would either be eliminated from certain stations or forced to a delayed broadcast by transcription at a less desirable hour. Nevertheless, for reasons having to do with the merits of the respective networks, Mutual was able to persuade the agency and the client to contract with Mutual. Mutual, furthermore, called the attention of the agency and the client to the Commission's Order of May 2, 1941 and the accompanying regulations in answer to the representations made by National, and it is affiant's information and belief that, if it had not been for its so doing, the account would have gone to National. This account is the largest piece of business Mutual has had in its history and, so far as is known [fol. 437] to affiant, it is the largest piece of business advertising a single product by any network. It represents over $2,250,000 gross billing annually. The program was scheduled to, and did, start November 3, 1941.

As soon as the fact became known that Mutual had secured the contract, National made redoubled efforts to deprive Mutual thereof through exploitation of its option-time contract provisions. Within 48 hours after Mutual had notified its affiliated stations of the Coca-Cola order,

National, which had previously been competing for the same program at the same or other hours, entered into contracts with one of the leading and best known advertising agencies for the broadcasting of two nationwide network commercial programs on Monday and Wednesday evenings from 10 p. m. to 10:30 p. m. for a large national advertiser, a manufacturer of drugs. Upon information and belief, affiant states that these specific hours were chosen primarily, if not entirely, to enable National to interfere with the broadcasting of Mutual's Coca-Cola program by stations having contracts with National. In any event, the result was that, on or about October 1, 1941, and thereafter, such stations were notified by National that National was exercising its option with respect to the two said half-hours beginning October 20 for two programs, the character of which said stations apparently had no knowledge. Because of such notifications from National, several such stations have been compelled to reject the Coca-Cola program, including stations at Tulsa, Okla., Birmingham, Ala., Houston, Tex., and Spokane, Wash. A number of other stations, however, similarly under contract with National, such as stations at Providence, R. I., Bridgeport, Conn., Richmond, Va., Cleveland, O., Charlotte, N. Car., Memphis, Tenn., Jacksonville, Fla., Ogden, Utah, and Des Moines, Ia., relying upon the Commission's regulations of May 2, 1941, as revised October 11, 1941, have declined to accede to National's demands. Due to the number and importance of such cities, together with the other cities on the Mutual network, the advertiser has not left Mutual. Affiant believes [fol. 438] and states the fact to be that, if the effective date of the regulations is postponed for any substantial period of time and National is permitted to compel these stations to adhere to their existing contracts, Mutual will lose this account. The client is unwilling, and has expressly stated its unwillingness, to take any station which does not broadcast the program all six evenings of the week on a live basis at the time scheduled (rather than by transcription), as otherwise the effectiveness of the particular advertising campaign of the client would be greatly impaired.

To illustrate the extremely unfavorable publicity which has already attended National's efforts to deprive Mutual of this program, affiant refers to articles appearing in *Variety*, October 8, 1941, at page 24, and *Broadcasting*, October 13, 1941, at page 14, copies of which appear in Appendix K.

(b) *The Bayuk Cigar Company Program.* The Ivey and Ellington Agency, in behalf of its client, the Bayuk Cigar Company, has been a regular user of the Mutual network, purchasing initially three one-quarter hours and now using five one-quarter hours a week. In all of the important markets where there are only three stations, the advertiser has been compelled to accept delayed broadcasts by transcription. Within the last two months the advertiser has notified Mutual of its intention to discontinue the use of the Mutual network and to purchase the Columbia network because of the large number of delayed broadcasts by transcription to which the advertiser has been subjected over the Mutual network (due to National having exercised its privilege under option-time contracts and having placed other network commercial programs in the time used by the advertiser over such stations). The advertiser contemplated adding another broadcast period a week to its schedule. It was unwilling to accept any delayed broadcasts by transcription and insisted upon assured time as scheduled. In view of the Commission's action of October 11, 1941 and relying thereon, Mutual assured the advertiser that, if it would purchase 8:00 to 8:15 on Friday night, which was currently unused by National's Blue Network on its affiliate [fol. 439] stations, Mutual would be able to provide Bayuk with uninterrupted broadcasting at the scheduled time. As a result, the advertiser has renewed its contract and has added the additional one-quarter hour. If the option-time privilege is successfully exercised by NBC on any of these stations, the advertiser will definitely exercise its right of cancellation with the Mutual network, and Mutual and its affiliates will lose the program.

(c) *General.* The loss of the Coca-Cola and the Bayuk Cigar Company programs, or either of them, would greatly and irreparably injure Mutual and its affiliates from the point of view of both revenue and prestige. Mutual has, at present, a total of 14¼ hours a week sold for network commercial programs over stations under contract with National or Columbia, within periods of time embraced by option-time provisions in those contracts, in markets regarded as essential by advertisers. As long as the restrictive contracts are permitted to be maintained in force, Mutual is subject to the continuous hazard of losing all or

any portion of these programs. The figure constitutes a very considerable portion of Mutual's total of network commercial programs and the loss of all or any very large portion of the 14¼ hours a week would be fatal to Mutual's continued existence as a national network. Furthermore, until the Commission's Regulations go into effect, Mutual will be virtually unable to sell any more time for commercial network programs during the more desirable hours, namely, those covered by National's option-time provisions. Representatives of three of the largest advertising agencies in the country, handling a very large and important volume of national advertising, have expressly stated to Mutual that they will not purchase time over Mutual for any client of theirs in such hours unless and until Mutual can give assurance with respect to continued clearance of the scheduled time equal to that which National or Columbia is able to give.

11. *Effect on Mutual's ability to secure and retain desirable affiliates.* Loss of business and the consequent loss [Vol. 440] of prestige such as Mutual has already suffered because of the restrictive contract provisions, and such as is threatened if those provisions are kept in force, has a serious adverse effect on Mutual's ability to secure and retain affiliate stations located in important markets and necessary to its successful operation as a national network. Under contracts between Mutual and its affiliates, the affiliates directly or indirectly bear the expenses of wire-lines necessary to link their stations with the Mutual network and, if the revenue received by an affiliate from Mutual drops below this expense (as is already the case in a number of instances), the affiliate tends to, and will, if the drop is substantial, terminate his affiliation with Mutual and thus deprive Mutual of an outlet in the market served by his station. In certain other instances where the affiliate's station has, for example, better coverage or a larger audience than the station affiliated with National's Blue Network serving the same market, Mutual will be unable to retain the affiliate as against the Blue Network and will be forced to accept a less desirable affiliate. Generally, the national network organization which is able, through volume of business or otherwise, to provide the larger revenue (subject to the qualification that it also provides the affiliate with a good continuous program service, commercial and sustaining), is

able to secure the station with the better coverage and the larger audience in any community, and to force the station to accept the maximum of whatever restrictions by way of exclusive option-time are permitted. Mutual, because of its smaller volume of business, is already under a heavy handicap in this respect, in competing for affiliates with either National's Red Network or Columbia's network, and is under somewhat of a handicap in competing for affiliates with National's Blue Network. Further loss of revenue will irreparably injure Mutual in this respect.

[fol. 441] VI

Lack of Injury to National and Columbia Through Immediate Enforcement of Regulations

1. *Discussion limited to certain Regulations.* Affiant's discussion will be confined primarily to Regulations 3.101, 3.103, and 3.104, having to do respectively with network exclusivity, length of contract, and option-time. By their language, and the provision made by the Commission for such extensions of time as may be necessary, Regulation 3.106, having to do with network ownership of stations, and Regulation 3.107, having to do with the operation of two supposedly competing networks by one organization, do not appear to have or threaten any immediate effect on either National or Columbia. Columbia's complaint does not seek relief against either of said Regulations or Regulation 3.108. Throughout its existence and without difficulty, Mutual has operated in conformity with Regulations 3.105 and 3.108, having to do with the affiliate's right to reject network programs and to fix its own rates on non-network commercial programs. Regulation 3.102, having to do with station exclusivity, obviously cannot operate to the injury of a network, but is of importance in a consideration of the effects of Regulations 3.101 and 3.104 and will be discussed incidentally in connection therewith.

2. *No adverse effect in cities adequately served by four or more full-time stations.* Apart from, and in addition to, the facts and circumstances recited in later paragraphs under this heading, Regulations 3.101 and 3.104, forbidding network exclusivity and restricting the use of option-time, cannot have any appreciable adverse effect on either National or Columbia in any city adequately served by four or more

full-time stations. In each such city, each of the four national networks (National's Red, National's Blue, Columbia, and Mutual) already has its regular full-time affiliate, and there will be no occasion or tendency on the part of any one of these networks to attempt to make use of a station [fol. 442] affiliated with any of the others. It is very important to any network that, so far as possible in any city, it have a regular affiliate, (a) known and advertised to the public as such, available not only for its network commercial but also its network sustaining programs, (b) interested in promoting the network and securing business and goodwill for it, and (c) in a position to cooperate with the network in providing programs or facilities for securing programs originating in that locality. The network organization will willingly and regularly accept a station with smaller coverage as its regular affiliate in preference to sharing the time of a station with greater coverage with another network, and will willingly and regularly contract to give such station first call on its programs as permitted by Regulation 3.102. That a form of contract complying with the Regulations and at the same time preserving this right of first call in a manner satisfactory both to networks and to affiliates, can easily be worked out and formulated, has already been demonstrated by Mutual in the contracts which it has drafted for this purpose, hereinbefore described. Each network having given first call on its programs to its respective affiliates, clearly there can be no such effects in such cities resulting from the operation of Regulations 3.101 and 3.104 as are stated or implied in the affidavits of Mr. Trammell and Mr. Paley. The unlikelihood of any complication arising from an attempt to create an "advertising super-network", is separately discussed below.

3. *No adverse effect with respect to time already in use for network commercial programs.* Nothing in the Commission's Regulations prevents, or interferes with, the carrying out by each network organization of any and all contracts with advertising agencies and advertisers for the use of any and all time now being used, or contracted to be used, over affiliated stations, for network commercial programs. This is true regardless of the amount or proportion of any station's time now subject to such contracts, regardless of the length of the period of time covered thereby, [fol. 443] and regardless of the number of stations render-

ing adequate service to a given city. Since virtually all such contracts are for a period of 52 weeks, and since ordinarily they expire in the early fall, the network commercial programs currently being broadcast thereunder over the National and Columbia networks will not, in the overwhelming majority of instances, be subject to disturbance or displacement in favor of the programs of another network or in favor of any non-network program earlier than the fall of 1942. Even then, due to the likelihood that the advertiser will desire to renew his contract for a further period of 52 weeks, due to the great interest, both financial and by way of prestige, which he, the affiliate, and the network have in such renewal, and due to the fact that, by reason of his continued use of such time, it will be clear for such purpose, the overwhelming probability is that it will be renewed over the same network and the same affiliate stations. In other words, neither the prohibition against network exclusivity nor the restrictions on option-time can have any adverse effect on time now already used over any station for National or Columbia network commercial programs. By the same token, but due to the Regulations becoming effective, time now actually in use over any station for Mutual programs cannot, during the period of the contract with the advertiser, be preempted for a new commercial program offered by another network.

4. *No adverse effect from limitation of option time to three hours per segment.* Passing over, for the moment, the requirement of Regulation 3.104 that option time provisions must henceforth be non-exclusive as between networks, affiant points out that, in the light of the undisputed facts, no adverse effect can result to National or Columbia from the limitation of network option-time to three hours per segment. Affiant states that, in the light of his experience, the Commission's division of the day into four segments (8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m. and 11 p. m. to 8 a. m.) corresponds as nearly as is practi-
[fol. 444] cable, without undue complications of detail and with due regard for differences in time zones across the country, to the recognized and generally accepted listening habits of the public, the evaluation of the hours of the day as to relative desirability from the point of view of advertisers and the various classes thereof, and the needs for time on the part of non-network advertisers, for sustaining

programs, and for purposes of programs of a local and regional character. The reservation by the Commission of anything over three hours in each segment free from network option corresponds very closely with actual practice in the case of those networks having the largest volume of network commercial programs, namely, National's Red Network and Columbia, and their affiliate stations. While in a few segments per week, one or the other of these networks may have slightly over three hours in actual use on some evenings on some (but by no means all) of their affiliate stations, the average actual use is substantially less than three hours per segment, and in those few instances where it is not, nothing in the Commission's Regulations prevents the continuance of such use under existing contracts with advertisers, or, with the consent of the stations involved, the renewal of such contracts.[17]

5. *No adverse effect from prohibition of option-time exclusive against other networks.* As affiant has already shown, in cities adequately served by four or more full-time stations, the restrictions imposed by Regulation 3.104 (as well as Regulation 3.101) cannot, as a practical matter, have any adverse effect on either National or Columbia. Affiant will now show that, so far as any legitimate purpose of option-time is concerned, the same is true in cities adequately served by less than four full-time stations.

[fol. 445] Because of the inherent characteristics of network broadcasting, including virtually instantaneous transmission over wire-lines to all parts of the country and simultaneous broadcasting by many stations of the same program, it is highly important, as a business convenience, that obstacles to the necessary clearance over the desired stations be eliminated so far as practicable. These obstacles, however, consist primarily in the scheduling by individual stations of *non-network* programs (local or na-

---

[17] In the morning segment, from 8 a. m. to 1 p. m., National, under its existing contracts on both its Red and Blue Networks, has an option only on two hours (from 10 a. m. to noon), and in the afternoon segment, from 1 p. m. to 6 p. m., only three hours (from 3 p. m. to 6 p. m.). Its evening option is 3½ hours (7 p. m. to 7:30 p. m. and 8 p. m. to 11 p. m.). It has no option on time between 11 p. m. and 8 a. m.

tional spot) at various hours, and, in the absence of provision for clearance of time against such programs, make it necessary for the network to consult, and in some instances, negotiate, for clearance of the time desired for a particular network commercial program. Such obstacles are not insuperable, as has been demonstrated by the operation of the Mutual network without option-time from its establishment in the fall of 1934 until early in 1940, and even since then with respect to a large number of its affiliates, as well as by the operation of National's networks without option-time to any substantial degree until after 1935. Regulation 3.104, however, permits option-time affording adequate and entirely sufficient clearance for three hours per segment against all such obstacles.[18]

By reason of their large existing use of the more desirable hours in each segment, the fact that existing contracts with advertisers are not disturbed by the Regulations, and the fact that each affiliate will desire to, and will, obtain first call upon the programs of any network with which it is affiliated, neither National's Red Network nor Columbia can possibly suffer any appreciable adverse effect from the [fol. 446] restriction under discussion. Their respective affiliates in cities having less than four full-time stations will desire to remain their affiliates and to have first call on their programs. The case is somewhat different with National's Blue Network which, by reason of its smaller volume of business, is actually making use of only part of the time of its affiliate stations which National has under option. It will be adversely affected in that in cities served

[18] Mr. Trammell's statement in his affidavit (page 20) is, in the light of the facts above stated, completely without foundation:

"Consequently, if optional time is prohibited, each and every advertising contract negotiated for such hours on the Red network would require negotiation by NBC with a minimum of 44 stations. In the normal course of its business, each of these stations would, under the Commission's amended Order, be scheduling the programs of other networks. Despite these conflicting demands, therefore, NBC would have to obtain the unanimous consent of not less than 44 persons, firms and corporations for each program scheduled."

by less than four full-time stations, with respect to those hours which it now has under option but has not been able to sell to any advertiser, it will (if the Regulation goes into effect) henceforth be deprived of its power to prevent its affiliates in such cities, at their discretion, from accepting and assuring the continuous broadcasting at the scheduled hour of network commercial programs provided by another network. In other words, National will, with respect to its Blue Network, be unable to exploit network option-time as a device to prevent or eliminate competition by another network, as distinguished from the legitimate purpose of option-time to provide simultaneous clearance over a number of stations as against non-network programs.

The prohibition against exclusive options will neither introduce nor lead to any appreciable confusion, difficulty in clearance, or necessity for negotiating with a number of stations as a prerequisite to entering into a contract with an advertiser. Each national network organization knows, and continuously maintains up-to-date information on, the use made by each of its affiliates of all time likely to be in demand for network commercial programs, and, in the case of cities adequately served by less than four full-time stations in which its affiliate may be serving also as the affiliate for another network, knows, and continuously maintains up-to-date information on, all time used over the station by the other network. Prospective national advertisers desiring new network commercial programs, or programs in addition to those already being broadcast, are not numerous and usually appear or become available singly and at the rate of only a very few per year. In all but a tiny fraction [fol. 447] of cases, all four national network organizations know of each prospect and actively compete for his business. Since most of the more desirable hours, particularly in the evening, are already in use over National's Red Network and Columbia, in most instances the competition is reduced to being between National's Blue Network and Mutual, each of which endeavors to provide the advertiser with access to the markets desired by him and in so doing offers access to the *same* stations in many cities (already enumerated) adequately served by less than four full-time stations. Once the time in question over these stations is sold to the advertiser by one of these networks, it is, of course, unavailable over these same stations to the other network for the period of the contract with the advertiser

(in the absence of exclusive option-time provisions in favor of the other network, such as are now exploited by National), but this is no more a disadvantage to one network than to the other, and is no more an injury to one advertiser than another, and cannot rightly be considered an injury to anyone, much less to broadcasting as an advertising medium. If it be deemed an injury to one network, it is relatively slight and is more than counterbalanced by the benefit to the affiliated stations and their audiences, and by the benefits resulting from active and fair competition on the merits of the competitors.

6. *No adverse effect from limitation of call period to 56 days.* So far as affiant knows, in all existing contracts of National and Columbia, the options may be exercised on not less than 28 days' notice. The increase in this call period to 56 days will not, in affiant's opinion, have any appreciable effect, adverse or otherwise. The time required for arranging the details of producing the program and the fact that in most instances a program to be broadcast during a given year, usually beginning in the fall, is actually contracted for more than 56 days in advance of its commencement or its renewal, will make adjustment to the new requirment a very simple matter involving no real inconvenience. Nothing in Regulation 3.104 prevents a sta- [fol. 448] tion from accepting a network commercial program offered it on less than 56 days' notice.

7. *The apprehended "advertising super-network."* Of the various chimaeric alarms which have been conjured up to incite opposition to the Commission's Regulations, the apprehended "advertising super-network" is the most fantastic. Among the obstacles which eliminate this as a practical possibility are

a) the tremendous and uneconomic expense of leasing the necessary wire-lines (including the greatly increased proportionate expense involved in leasing wire-lines for short periods weekly), and the difficulty of securing such lines reaching many important and indispensable markets,

b) the fact that such a network, in order to hold its affiliates and justify its continued existence, would have to provide a sustaining program service for its affiliates, with attendant expenses in studio, equipment, staff, engi-

neering, promotion and publicity, all at a disproportionate cost,

c) the fact that on almost all the stations that would be necessary to constitute such a network, virtually all their desirable hours are now in actual use either for network commercial programs, or for non-network commercial programs (local or national spot), providing a greater revenue than could possibly be provided by the "super-network" advertisers,

d) the unwillingness of the owners of stations such as would be necessary to constitute such a network, to deal or affiliate themselves with any transient or fly-by-night venture, or any venture having an adverse effect upon the stations' total revenue.

The fact that no attempt has been made in the past to set up such a network, either in the period prior to 1935 when National had no exclusivity provisions and only inconsider- [fol. 449] able option-time provisions in its contracts, or since 1935 during hours not subject to option or, if subject, not actually used, demonstrates that it is not a reasonable possibility. To add to the unlikelihood that the possibility has any practical significance, affiant points to the fact that the 64-station hook-up suggested for such a purpose in Exhibit I attached to Mr. Trammell's affidavit, includes, as nearly as affiant can calculate, 44 stations which are now affiliated with National's Red Network, 15 stations which are now affiliated with Columbia, and 5 stations which are now affiliated with National's Blue Network. In other words, even in the present state of affairs, National's Red Network comes very close to being the apprehended "super-network", and, if present tendencies are permitted to continue under the restrictive contracts, National's Red Network and Columbia will actually constitute such network, to the disadvantage and eventual exclusion of all effective competitors.

8. *Apprehended diversion of advertising to other media.* The apprehension asserted in behalf of National and Columbia that the Regulations will result in diversion of advertising from radio to other media, is without foundation. As already pointed out, so far as clearance of time over affiliate stations serves any legitimate need or convenience, it is permitted by the Regulations, and the advertiser, once

having contracted through a network for a given period of time over a specified list of stations, will be assured (to a much greater extent than at present in the case of Mutual and to the same extent as at present in the case of National and Columbia) of continued use of the time for the period of his contract. The effectiveness of radio as a medium to reach the public cannot possibly be impaired, and should be enhanced, by enforcing the Regulations.

9. *Apprehended elimination or impairment of sustaining program service.* The charge that enforcement of the Regulations will result in elimination or impairment of sustaining program service by the networks is directly contrary to fact. To be successful in competition with other [fol. 450] networks, each network must offer its affiliates, and through them the public, a continuous sustaining program service of excellent character and embracing varied features. The shortcomings of any one network in this respect will inevitably be reflected in loss of audience and public favor, in loss of the better affiliates in each city, and in eventual loss of the patronage of advertisers, to the advantage of such network's competitors.

10. *No adverse effect from two-year limitation on length of contracts.* Affiant is unable to perceive or anticipate any adverse effect on any network from Regulation 3.103, placing a two-year limitation on the contracts between networks and affiliates, as distinguished from the five-year term now prevailing, *except* that, in the course of competition between networks for affiliates, a shorter term may eventually conduce toward bringing about more frequent adjustments of the rate of compensation paid by the network to the station so as to provide the station with a more nearly fair and adequate share of the profits of network broadcasting. This, however, will be a slow process in any event and will not be particularly marked or substantial during the next two years.[19]

11. *General.* Over and above what affiant has already stated, affiant repeats and emphasizes the fact that, for the

[19] In this connection it should be noted, with reference to two of the affidavits filed by National, the contract of WOW, Omaha, with National expired December 2, 1941, and the contract of WHAM, Rochester, with National will expire February 1, 1942.

usual business year in broadcasting, from September to September, virtually all business that is likely to be placed on national networks has already been placed (except for occurrences such as have already been pointed out, consisting of National's practices under its contracts and their effect on Mutual's programs). Except in the case of Mutual, where the effect is salutary, the Regulations have, and can have, no effect on existing network business for the duration of current contracts with advertisers (therefore, [fol. 451] until September, 1942). Assertions such as are made by Mr. Trammell in his affidavit (pages 19, 21) or by Mr. Paley in his affidavit (pages 34-35) that the Regulations, either taken together or separately, will "destroy the present structure of network broadcasting" are absurd in view of the known and undisputed facts.

Fred Weber.

Subscribed and sworn to before me this 11th day of December, 1941. ——— ———, Notary Public. ——— County, N. Y. Co. Clk's. No. —, Reg. No. —. Term expires ———, 194—. (Seal.)

[fol. 452]

APPENDIX A

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
WOR	New York, N. Y.	11,690,520		50,000	50,000	710	Unlimited
WGN	Chicago, Ill.	4,499,126		50,000	50,000	720	"
WIP	Philadelphia, Pa.	2,898,644		5,000	5,000	610	"
CKLW	Detroit—Windsor, Mich.	2,295,867		5,000	5,000	800	"
WLOL	Minneapolis-St. Paul, Minn.	911,077		1,000	1,000	1,330	"
WHK	Cleveland, Ohio	1,214,943	N.B.C. Blue	5,000	5,000	1,420	"
WCLE	Cleveland, Ohio	1,214,943		500	.....	610	Daytime
WOL	Washington, D. C.	907,816		1,000	1,000	1,260	Unlimited
WFBR	Baltimore, Md.	1,046,692		5,000	5,000	1,300	"
KWK	St. Louis, Mo.	1,367,977		5,000	5,000	1,380	"
WCAE	Pittsburgh, Pa.	1,994,060		5,000	5,000	1,250	"
WGR	Buffalo-Niagara, N. Y.	857,719		5,000	1,000	550	"
WKRC	Cincinnati, Ohio	789,309		5,000	1,000	550	"
KITE	Kansas City, Mo.-Kans.	634,093		1,000	1,000	1,590	"
WHB	Kansas City, Mo.-Kans.	634,093		1,000	.....	880	Daytime
WIBC	Indianapolis, Ind.	455,357		5,000	1,000	1,070	Unlimited
KFEL	Denver, Colo.	384,372		5,000	5,000	950	"
WSAY	Rochester, N. Y.	411,970		250	250	1,240	"
WHKC	Columbus, Ohio	365,796		500	.....	640	L-KFI
WAGE	Syracuse, N. Y.	258,352		1,000	1,000	620	Unlimited
WHBF	Rock Island-Davenport-Moline, Ill.-Ia.	174,995		5,000	5,000	1,270	"
KFOR	Lincoln, Neb.	88,191		250	250	1,240	"

[fol. 453]

APPENDIX A—Continued

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
			COLONIAL STATIONS				
WAAB	Boston, Mass.	2,350,514		1,000	1,000	1,440	Unlimited
WEAN	Providence, R. I.	711,500	N.B.C. Blue	5,000	5,000*	790	"
WFCI	Pawtucket, R. I. Providence, R. I.	711,500		1,000	1,000	1,420	"
WTHT	Hartford, Conn.	502,193		250	250	1,230	"
	New Britain, Conn.	308,228		1,000	500	960	"
WELI	New Haven, Conn.	394,623		500	500	1,270	"
WSPR	Holyoke-Springfield, Mass.	216,621	N.B.C. Blue	1,000	500	600	"
WICC	Bridgeport, Conn.	144,822		1,000*	1,000*	1,320	"
WATR	Waterbury, Conn.	272,648		250	250	1,340	"
WNBH	Fall River-New Bedford, Mass.	272,648		1,000	1,000	1,480	"
WSAR	Fall River-New Bedford, Mass.	334,969		250	250	1,400	"
WLLH	Haverhill-Lowell-Lawrence, Mass.	49,684		250	250	1,340	"
WBRK	Pittsfield, Mass.	38,598		250	250	1,240	"
WCOU	Lewiston, Me.	30,456		250	250	1,490	"
WNLC	New London, Conn.	17,082		1,000*	1,000*	1,380*	"
WSYB	Rutland, Vt.	15,672		250	250	1,240	"
WHAI	Greenfield, Mass.	13,484		250	250	1,340	"
WLNH	Laconia, N. H.						

[fol. 454]

DON LEE

KHJ	Los Angeles, Cal.	2,904,596		5,000	5,000*	930	Unlimited
KFRC	San Francisco-Oakland, Cal.	1,428,525		5,000	5,000	610	"
KOL	Seattle, Wash.	452,639		5,000	5,000*	1,300	"
KALE	Portland, Ore.	406,406		5,000	5,000	1,330	"
KGB	San Diego, Cal.	256,368		1,000	1,000	1,360	"
KGA	Spokane, Wash.	141,370	N.B.C. Blue	10,000*	10,000*	1,510	"
KMO	Tacoma, Wash.	156,018		5,000	5,000	1,360	"
KTKC	Visalia-Fresno, Cal.	97,504		5,000*	5,000*	940*	"
KPMC	Bakersfield, Cal.	29,252		1,000	1,000	1,600	"
KFXM	San Bernardino, Cal.	43,646		250	250	1,240	S-KPPC
KDB	Santa Barbara, Cal.	34,958		250	250	1,490	Unlimited
KIT	Yakima, Wash.	27,221		1,000	1,000	1,280	"
KVOE	Santa Ana, Cal.	31,921		250	250	1,490	"
KRKO	Everett, Wash.	30,224		250	100	1,400	"
KORE	Eugene, Ore.	20,838		250	250	1,450	"
KFJI	Klamath Falls, Ore.	16,497		100	100	1,240	"
KXRO	Aberdeen, Wash.	18,846		250	250	1,340	"
KIEM	Eureka, Cal.	17,055		1,000	500	1,480	"
KGY	Olympia, Wash.	13,254		100	100	1,240	"
KMYC	Marysville, Cal.	6,646		100	100	1,450	"
KYOS	Merced, Cal.	10,135		250	.....	1,080	Daytime
KXO	El Centro, Cal.	10,017		100	100	1,490	Unlimited
KHSL	Chico, Cal.	9,287		1,000	1,000*	1,290	"
KVEC	San Luis Obispo, Cal.	8,881		250	250	1,230	"

APPENDIX A—Continued

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
KDON	Monterey, Cal.	10,084		250*	250*	1,240	Unlimited
KVCV	Redding, Cal.	8,109		250	250	1,230	"
KOOS	Marshfield, Ore.	5,259		250	250	1,230	"
KWLK	Longview, Wash.	12,385		250	250	1,400	"
KRNR	Roseburg, Ore.	4,924		250	250*	1,490	"
KELA	Centralia, Wash.	7,414		1,000	1,000	1,470	"
KWIL	Albany, Ore.	5,654		250	250	1,240	"
KAST	Astoria, Ore.	10,389		250	250	1,230	"
		NORTHEAST GROUP					
WJW	Akron, Ohio	349,705		250	250	1,240	"
WABY	Albany, N. Y.	431,575		250	250	1,400	"
WILM	Wilmington, Del.	188,974		250	250	1,450	"
WARM*	Wilkes-Barre-Scranton, Pa.	629,581		250	250	1,400	"
WHBC	Canton, Ohio	200,352		250	250	1,230	"
WKBO	Harrisburg, Pa.	173,367	N.B.C. Red, Blue	250	250	1,230	"
WNBF	Binghamton, N. Y.	145,156	C.B.S.	5,000*	5,000*	1,290*	"
WBAX	Wilkes-Barre-Scranton, Pa.	629,581		100	100	1,240	"
WGAL	Lancaster, Pa.	132,027	N.B.C. Red, Blue	250	250	1,490	"
WORK	York, Pa.	92,627	N.B.C. Red, Blue	1,000	1,000	1,350	"
WENY	Elmira, N. Y.	45,106		250	250	1,230	"
WSTV	Steubenville, Ohio	37,651		250	250	1,340	"
WEST	Easton, Pa.	33,589		250	250	1,400	"
WLBZ	Bangor, Me.	29,822	N.B.C. Red, Blue	5,000*	5,000*	620	"
WEIM*	Fitchburg, Mass.	41,824		250	250	1,340	"
WPAY	Portsmouth, Ohio	40,466		250*	250*	1,400	"
WJEJ	Hagerstown, Md.	32,491		250	250	1,240	"

WAZL	Hazleton, Pa.	38,009		250	250	1,450	Unlimited
WRDO	Augusta, Me.	19,360	N.B.C. Red, Blue	100	100	1,400	"
WFEA	Manchester, N. H.	77,685	N.B.C. Red	5,000*	5,000*	1,370	"
			Mid-West Group				
KOIL	Council Bluffs-Omaha, Ia.-Neb.	287,698	C.B.S.	5,000	5,000	1,290	"
KSO	Des Moines, Ia.	183,973	N.B.C. Blue	5,000	5,000*	1,460	"
WLAV	Grand Rapids, Mich.	209,873		250	250	1,340	"
KFBI	Wichita, Kans.	127,308		5,000	1,000	1,070	"
WROK	Rockford, Ill.	105,259		1,000	500	1,440	"
KGHI	Little Rock, Ark.	126,724		250	250	1,230	"
WMT	Cedar Rapids, Ia.	73,219	C.B.S.	5,000	5,000	600	"
KDTH	Dubuque, Ia.	43,892		1,000	1,000	1,370	"
KSAL	Salina, Kans.	21,073		1,000	1,000	1,150	"
KOTN	Pine Bluff, Ark.	21,290		250	250	1,490	"
KWFC	Hot Springs, Ark.	21,370		250	250	1,340	"
KWOS	Jefferson City, Mo.	24,268		250	250	1,240	"
KTSW	Emporia, Kans.	13,188		250	250	1,400	"
KGGF	Coffeyville, Kans.	17,355		1,000	500	690	"
KBTM	Jonesboro, Ark.	11,729		250	100	1,230	"
KMA	Shenandoah, Ia.	6,846	N.B.C. Blue	5,000	1,000	960	"
KVGB	Great Bend, Kans.	9,044		250	250	1,400	"
			Southeast Group				
WRNL	Richmond, Va.	245,674	N.B.C. Blue	5,000*	5,000*	910	"
WGH	Portsmouth-Newport News-Norfolk, Va.	323,326		250	250	1,340	"

[fol. 457]

APPENDIX A—Continued

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
WSOC	Charlotte, N. C.	112,986	N.B.C. Red	250	250	1,240	Unlimited
WSLS	Roanoke, Va.	110,593		250	250	1,490	"
WCOS	Columbia, S. C.	89,555	N.B.C. Blue	250	250	1,400	"
WCMI	Huntington-Ashland, W. Va.-Ky.	170,979		250	250	1,340	"
WAIR	Winston-Salem, N. C.	109,833		250	250	1,340	"
WMRC	Greenville, S. C.	34,734		250	250	1,490	"
WRAL	Raleigh, N. C.	46,897		250	250	1,240	"
WLVA	Lynchburg, Va.	44,541		250	250	230	"
WBTM	Danville, Va.	32,749		250	250*	1,400	"
WSTP	Salisbury, N. C.	19,037		250	250	1,490	"
WBBB	Burlington, N. C.	12,198		1,000	.....	920	Daytime
			Southern Group				
WATL	Atlanta, Ga.	442,294		250	250	1,400	Unlimited
WNOE	New Orleans, La.	540,030		250	250	1,450	"
WMPS	Memphis, Tenn.	332,477	N.B.C. Blue	1,000	500	1,460	"
WGRC	Louisville, Ky.	434,408		250	250	1,400	"
WSGN	Birmingham, Ala.	407,851	N.B.C. Blue	1,000	1,000	610	"
WSIX	Nashville, Tenn.	241,769		5,000*	5,000*	980*	"
WJHP	Jacksonville, Fla.	195,619	N.B.C. Blue	250	250	1,320	"
WDEF	Chattanooga, Tenn.	193,215		250	250	1,400	"
WBIR	Knoxville, Tenn.	151,829		250	250	1,240	"
WTSP	St. Petersburg-Tampa, Fla.	209,693		1,000	500	1,380	"
WGBF	Evansville, Ind.	141,614	N.B.C. Red, Blue	5,000	1,000	1,280	"

[fol. 458]

WLAP	Lexington, Ky.	49,304		250	250	1,450	Unlimited
WMOB	Mobile, Ala.	114,906		250	250	1,230	"
WBML	Macon, Ga.	74,830		250	250	1,240	"
WJBY	Gadsden, Ala.	36,975		250	250	1,240	"
WTJS	Jackson, Tenn.	24,332		1,000*	1,000*	1,390	"
WALB	Albany, Ga.	19,055		1,000	1,000	1,590	"
WRUF	Gainesville, Fla.	13,757		5,000	.....	850	L-KOA
WHBB	Selma, Ala.	19,834		100	100	1,490	Unlimited
WMSL	Decatur, Ala.	16,604		250	250	1,400	"
WBLJ	Dalton, Ga.	10,448		250	250	1,230	"
WDAK	West Point, Ga.	3,591		250	250	1,340	"
			Southwest Group				
KXYZ	Houston, Tex.	510,397	N.B.C. Blue	5,000*	5,000*	1,320*	"
WRR	Dallas, Tex.	376,548		5,000*	5,000*	1,310	"
KABC	San Antonio, Tex.	319,010		250	250	1,450	"
KFJZ	Fort Worth, Tex.	207,677		5,000*	5,000*	1,270	"
KOCY	Oklahoma City, Okla.	221,229		250	250	1,340	"
KOME	Tulsa, Okla.	188,562	N.B.C. Blue	250	250	1,340	"
KNOW	Austin, Tex.	106,193		250	250	1,490	"
KRIS	Corpus Christi, Tex.	70,677	N.B.C. Red, Blue	1,000	1,000	1,360	"
KPAC	Beaumont-Port Arthur, Tex.	138,608		500	500	1,250	"
KFDA	Amarillo, Tex.	53,463		250	250	1,230	"
WACO	Waco, Tex.	71,114		250	250	1,450	"
KGKL	San Angelo, Tex.	25,802		250	250	1,400	"

APPENDIX A—Continued

Stations Affiliated with the Mutual Broadcasting System, Inc.

November 1, 1941

Stations	Cities	Population	Primary Affiliations	Power		Frequency (kilocycles)	Hours of Operation
				Day	Night		
KCMC	Texarkana, Tex.	28,840		250	250	1,450	Unlimited
KRBC	Abilene, Tex.	26,612		250	250	1,450	"
KBST	Big Spring, Tex.	12,604		100	100	1,490	"
KRRV	Sherman, Tex.	17,156		1,000	1,000	910	"
KTEM	Temple, Tex.	15,344		250	250	1,400	"
KRGV	Weslaco, Tex.	6,883	N.B.C. Red, Blue	1,000	1,000	1,290	"
			Northwest Group				
WHBL	Sheboygan, Wis.	40,368		1,000*	1,000*	1,330	"
WHBY	Appleton, Wis.	28,436		250	250	1,230	"
WFHR	Wisconsin Rapids	11,416		250	250	1,340	"
KFIZ	Fond Du Lac, Wis.	27,299		250	250	1,450	"
WSAU	Wausau, Wis.	27,268		250	250	1,400	"
WHDF	Calumet, Mich.	Under 5,000		250	250	1,400	"
WDSM	Duluth-Superior, Minn.-Wis.	157,098		100	100	1,230	"
KTRI	Sioux City, Ia.	87,791		250	250	1,450	"
KVOX	Fargo-Moorhead, N. D.	42,071		250	250	1,340	"
KVFD	Ft. Dodge, Ia.	22,904		250	250	1,400	"
KWNO	Winona, Minn.	22,490		250	250	1,230	"
KGCU	Bismarck-Mandan, N. D.	22,181		250	250	1,270	"
KABR	Aberdeen, S. D.	17,015		5,000	5,000	1,420	"
KLPM	Minot, N. D.	16,577		1,000	1,000	1,390	"
KATE	Albert Lee, Minn.	12,200		250	250	1,450	"
KGDE	Fergus Falls, Minn.	10,548		250	100	1,230	"
KRMC	Jamestown, N. D.	8,790		250	250	1,400	"

[fol. 460]

KDLR	Devils Lake, N. D.	6,204		250	250	1,240	Unlimited
KWLM	Willmar, Minn.	7,623		250	250	1,340	"
WJMS	Ironwood, Mich.	13,369		250	250	1,450	"
WATW	Ashland, Wis.	11,101		100	100	1,400	"
			Mountain Group				
KLO	Ogden-Salt Lake City, Utah	204,488	N.B.C. Blue	5,000	5,000	1,430	"
KFXJ	Grand Junction, Colo.	12,479		1,000*	500*	920*	"
KFKA	Greeley, Colo.	15,995		1,000	1,000	910	S-KPOF
KOVO	Provo, Utah	18,071		250	250	1,240	Unlimited
KEUB	Price, Utah	5,214		250	250	1,450	"
			Group Outside United States				
KGMB	Honolulu, T. H.			5,000	5,000	590	"
KHBC	Hilo, T. H.			250	250	1,230	"
KGBU	Ketchikan, Alaska			500	500	930	"
CKLW	Windsor, Ontario (Previously listed)						

* Construction permit only.

NOTE: The affiliations and facilities above listed are corrected to November 1, 1941. City populations based on 1940 census figures, metropolitan district figures used whenever applicable. Affiliations based upon November 1, 1941 edition of Standard Rate and Data, except Mutual, whose affiliations are based upon its own files.

[fol. 461]

Appendix B

Comparison of Facilities of Broadcast Stations Affiliated with the Four National Networks

(As of November 1, 1941)

Full-time Stations

	Size of City	National (Red)	National (Blue)	Columbia	Mutual
Clear Channel 50 kw.	1,000,000 up	9[1]	3[2]	6	2
	500,000 "	3	1	6	..
	100,000 "	6	3	8	..
	25,000 "	1	1.	..	..
		19[3]	8[3]	20	2
Clear Channel below 50 kw.	1,000,000 up	..	2	..	..
	500,000 "	..	..	..	..
	100,000 "	1	5	5	3
	25,000 "	1	..	2	1
	10,000 "	..	1	..	1
		2[4]	8[4]	7	5[5]
Regional (1 kw. to 5 kw.)	1,000,000 up	3	6	5	8
	500,000 "	8	7	5	8
	100,000 "	28	22	34	19
	25,000 "	16	20	20	9
	10,000 "	4	5	4	9
	5,000 "	..	2	1	4
	5,000 down	1	..	..	..
		60[6]	62[6]	69	57[7]
Regional (less than 1 kw. at night)	1,000,000 up	..	..	..	..
	500,000 "	..	..	..	..
	100,000 "	2	5	..	7
	25,000 "	2	2	..	..
	10,000 "	1	2	..	1
		5[8]	9[8]	..	8[9]
Local (100 w. to 250 w.)	1,000,000 up	..	1	..	..
	500,000 "	1	3	..	4
	100,000 "	11	12	8	24
	25,000 "	8	24	6	35
	10,000 "	12	16	6	30
	5,000 "	2	4	..	10
	5,000 down	1	1	..	3
		35[6]	61[6]	20	106[10]

[fol. 462] APPENDIX B—Continued

Comparison of Facilities of Broadcast Stations Affiliated with the Four National Networks

(As of November 1, 1941)

Part-time Stations

	Size of City	National (Red)	National (Blue)	Columbia	Mutual
Clear Channel 50 kw.	100,000 up	1	..	..	..
		1	..	..	..
Clear Channel below 50 kw.	500,000 up	..	..	..	1
	100,000 "	..	1	..	1
	25,000 "	1	1	..	..
	10,000 "	1	1	1	2
		2[2]	3[3]	1	4
Regional (1 kw. to 5 kw.)	1,000,000 up	..	..	..	1
	500,000 "	..	1	1	..
	100,000 "	..	..	..	..
	25,000 "	..	..	1	..
	10,000 "	..	..	..	2
		..	1	2	3
Regional (less than 1 kw. at night)	1,000,000 up	..	..	..	..
	500,000 "	..	..	..	..
	100,000 "	1	1	..	..
		1[4]	1[4]	..	..
Local (100 w. to 250 w.)	25,000 up	..	..	..	1
		..	..	..	1
Total		125	153	119	186

[1] WFAA–WBAP treated as one full-time station.
[2] WENR–WLS treated as one full-time station.
[3] Includes 2 stations affiliated with both Red and Blue.
[4] Includes 1 station affiliated with both Red and Blue.
[5] Includes 1 station primarily affiliated with N.B.C. Blue.
[6] Includes 19 stations affiliated with both Red and Blue.
[7] Includes 3 stations primarily affiliated with Columbia, 4 with both N.B.C. Red and Blue, 7 with N.B.C. Blue, and 2 with N.B.C. Red.
[8] Includes 4 stations on both N.B.C. Red and Blue.
[9] Includes 3 stations primarily with N.B.C. Blue.
[10] Includes 3 stations primarily affiliated with both N.B.C. Red and Blue, 3 with N.B.C. Blue, and 1 with N.B.C. Red.

Note.—Only stations within continental United States are considered. Population figures based upon 1940 census, with metropolitan districts used when applicable. Classifications include facilities authorized by construction permit only.

[fol. 463] APPENDIX C

Affiant's Letter to Mutual Stockholders, October 31, 1941

Mutual Broadcasting System, Inc.

New York Office: 1440 Broadway, New York

October 31, 1941.

To: Stockholders of the Mutual Broadcasting System:

As you are aware, the Monopoly Regulations of the Federal Communications Commission become effective on November 15, 1941. In view of the short time remaining before that effective date, we send you herewith a letter agreement modifying your existing contract with Mutual, and request that you immediately execute it and return it to us.

We are at present preparing new contracts which will embody the various changes required by the Monopoly Regulations, as well as other changes which have been discussed at our Board of Directors Meetings. These contracts will be submitted to you as soon as possible, after which the date of the next meeting of the Board of Directors will be advised.

Your cooperation in immediately returning the enclosed agreement, signed by you, to our Chicago office, attention of Mr. E. M. Antrim, will be greatly appreciated.

With kindest regards, Fred Weber.

FW:mk
Enc.

[fol. 464] APPENDIX D

Mutual's Agreement with its Stockholders, October 31, 1941

Mutual Broadcasting System, Inc.

Branch Office: 1440 Broadway, New York

October 31, 1941.

GENTLEMEN:

Confirming the understanding between us, it is agreed that notwithstanding anything to the contrary contained in the contract between you and the Mutual Broadcasting System, Inc.,

(1) The option time referred to in said contract shall be exclusive, except as against other network organizations, it being understood that notwithstanding such option time, you will not be prevented or hindered from optioning (under non-exclusive options) or selling any or all of said option time, or other time, to other network organizations. You will clear and furnish to Mutual any period or periods of time within said option time for broadcasting of any Mutual commercial network program or programs upon fifty-six (56) days' notice from Mutual, unless prior to such notice from Mutual you shall have actually made a bona fide sale to another network organization of the period or periods of time within said option time required by Mutual for the advertiser. No commitment to any other network organization made in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission shall be deemed to be a bona fide sale for the purpose of this paragraph. You may refuse to execute a commitment to furnish broadcasting time to Mutual for the broadcasting of any program or programs which you reasonably believe to be unsatisfactory or unsuitable.

(2) The provisions of said contract with regard to your exclusive association with Mutual is hereby revoked and rescinded.

(3) Any other provisions of said contract in violation of Section 3.101, 3.108 both inclusive of the Regulations of [fol. 465] the Federal Communications Commission is hereby revoked and rescinded.

The provisions of this letter shall become effective immediately.

Except as herein specifically modified, said contract shall continue in full force and effect.

If the provisions of this letter meet with your approval will you please indicate your assent thereto by affixing your signature on each of the enclosed copies of this letter and return to our Chicago Office, attention of Mr. E. M. Antrim.

Yours very truly, Mutual Broadcasting System, Inc.,
By Fred Weber, General Manager.

FW:pwh.
Approved ———.
Date ———.

[fol. 466] APPENDIX E

Mutual's Proposed Contract to Conform to the Revised Regulations

This Agreement, made at Chicago, Illinois, as of ———, 194—, between Mutual Broadcasting System, Inc., an Illinois corporation (hereinafter called "Mutual"), and ——— (hereinafter called the "Broadcaster"),

Witnesseth:

The Broadcaster is the owner and operator of radio station ———, located at ——— (hereinafter called the "Station").

Mutual is engaged in the operation of a national radio broadcasting network composed of stations which are owned or operated by or affiliated with Mutual's shareholders and of other stations which are from time to time affiliated with the Mutual network. It is the intention of Mutual and the Broadcaster that the network shall remain cooperative in character, and that the stations composing the network shall retain the advantages thereof, including: effective control on the part of such stations of the acceptance or rejection of programs to the end that the public interest may be best served, full participation in the profits of network operation, the preservation of local control and ability to meet local and regional needs in the public interest, the greater geographical diversification of program-originating points, the prevention of tendencies toward monopoly and toward concentration of program control in a small group or in a particular locality, and the furtherance of the principle of competition.

The Broadcaster and Mutual are desirous of entering into an agreement, on the terms and conditions hereinafter set forth, for the affiliation of the Station with the Mutual network and for the sale by the Broadcaster and the purchase by Mutual of broadcasting time on the Station for the broadcasting of Mutual network commercial programs.

Now, Therefore, It Is Mutually Agreed as Follows:

1. Mutual will contract with the American Telephone and Telegraph Company for the maintenance by the latter, com-
[fol. 467] mencing on ———, 194—, of a program transmission line extending to ———.

2. Mutual and the Broadcaster will each publicize the Station as the regular Mutual outlet in the city in which the Station is located. The Station shall have the right to the first call on Mutual network commercial and sustaining programs in said city and Mutual shall not offer any series of programs or single program (not a part of a series) to any other radio station located in said city unless said series of programs or single program has been offered to the Broadcaster for broadcasting through the Station under this contract and the Broadcaster shall have failed or refused to accept such program or programs within forty-eight (48) hours after Mutual's offer.

(A) In the case of a commercial program or a series of commercial programs:

(1) If the Broadcaster is unable to clear the required period or periods of time on the Station for such program or programs but notifies Mutual within said 48 hours that the Broadcaster can clear a mutually satisfactory substitute period or periods and is able and willing to broadcast the program or programs by means of off-the-line recordings (made by the Broadcaster without cost to Mutual or the advertiser) during such substitute period or periods, Mutual will accept such substitute period or periods, unless the advertiser is unwilling to accept such broadcasting by the Station by means of off-the-line recordings during such substitute period or periods, it being understood that Mutual is not obligated to require the advertiser to accept such delayed broadcasting; and

(2) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs scheduled to run for thirteen weeks or more or a series of separable programs, but notifies Mutual within said 48 hours that the Broadcaster will clear said periods of time upon a specified date not later than four (4) weeks after the commencement of the series of programs, Mutual will contract for such periods of time on the Station as of the specified date upon which the Broadcaster is able to clear such periods, unless the advertiser refuses to accept such postponement of broadcasting on the Station.

[fol. 468] If the Broadcaster fails or refuses to accept said program or programs or if the Broadcaster is unable to clear the required period or periods of time and Mutual is

unable to persuade the advertiser to use a substitute period or periods or to postpone the commencement of such programs on the Station, as provided in the preceding subparagraphs, Mutual may contract with any other station located in said city for the broadcasting of said commercial program or programs.

(B) In the case of a single sustaining program or series of sustaining programs:

(1) If the Broadcaster is unable to clear the required period or periods of time for such program or programs but notifies Mutual that the Broadcaster will broadcast the program or programs by transcription at a mutually satisfactory substitute period or periods, Mutual will not offer said program or programs to any other station in said city; and

(2) If the Broadcaster is unable to clear immediately the required periods of time for a series of programs, Mutual, in offering said series of programs to any other station in said city, will offer said series subject to recapture by the Station on one (1) week's notice to Mutual.

It is understood, however, that notwithstanding the foregoing, Mutual may make available to any other station in said city special sustaining programs of great public importance (such as, but not limited to, addresses of the President of the United States).

3. Mutual will use its best efforts to secure contracts from advertisers for the broadcasting of commercial programs through the Station, as well as through all other stations regularly affiliated with Mutual, but Mutual does not undertake to refuse any commercial programs simply because the advertiser refuses to purchase coverage in the city in which the Station is located. The Broadcaster will sell broadcasting time on the Station to Mutual for broadcasting commercial programs, and will broadcast such programs through the Station, on the following terms and conditions:

[fol. 469] (A) The Broadcaster hereby grants to Mutual an option on the periods of time on the Station specified in Exhibit A hereto attached, hereinafter called the "Mutual option time". This option shall be exclusive, except as against other network organizations, it being understood that the granting of this option to Mutual shall not prevent or hinder the Broadcaster from optioning (under nonexclu-

sive options) or selling any or all of the Mutual option time, or other time, to other network organizations. The Broadcaster will clear and furnish to Mutual any period or periods of time within the Mutual option time for the broadcasting of any Mutual commercial network program or programs upon fifty-six (56) days' notice from Mutual, unless prior to such notice from Mutual the Broadcaster shall have actually made a bona fide sale to another network organization of the period or periods of time required by Mutual for the advertiser. No commitment to any other network organization made in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission shall be deemed to be a bona fide sale for the purpose of this contract. The Broadcaster may refuse to execute a commitment to furnish broadcasting time to Mutual for the broadcasting of any program or programs which the Broadcaster reasonably believes to be unsatisfactory or unsuitable. (Mutual will use its best efforts to supply to the Broadcaster such information as it may request regarding any proposed program or programs.)

(B) If the period or periods of time on the Station required for broadcasting any Mutual network commercial program or programs are outside the Mutual option time and if the Broadcaster elects to sell such required period or periods of time to Mutual for the broadcasting of such program or programs, such time shall be sold to Mutual on the terms and conditions contained in the following subparagraphs of this paragraph, i.e., on the same terms and conditions as time within the Mutual option time is sold to Mutual.

(C) Mutual will charge each advertiser at the following rates, for broadcasting time on the Station furnished to such advertiser by Mutual:

(1) In order to encourage the use by advertisers of a greater number of stations affiliated with Mutual for the broadcasting of the advertiser's programs, Mutual has established special competitive volume discounts for adver- [fol. 470] tisers contracting for periods of time on a substantial number of such stations. The minimum number of stations which must be used to entitle the advertiser to such special volume discounts is, at present, 76 stations, but it is understood that Mutual may increase or decrease this minimum from time to time, if Mutual finds it necessary or desirable to do so to meet competitive con-

ditions. Accordingly, if any advertiser contracts with Mutual for periods of time on at least the number of stations then specified by Mutual as the minimum number of stations necessary to entitle the advertiser to such special volume discounts, Mutual will charge the advertiser for time on the Station at a Volume Network Rate equal to the Station's single-time rate for the period of time used on any day, in the applicable time classification, less the applicable special volume discount specified below, depending upon the number of programs broadcast by Mutual for the advertiser during a period of fifty-two consecutive weeks:

13 broadcasts—20% discount
26 broadcasts—25% discount
52 broadcasts—35% discount
104 broadcasts—40% discount
156 broadcasts—42½% discount
208 broadcasts—45% discount
260 broadcasts—50% discount

No such special volume discount, however, will be allowed to any advertiser with respect to time purchased by the Advertiser under any contract for a term of less than thirteen consecutive weeks. In computing the Volume Network Rate for the programs of any advertiser, the Station's single-time rates will be deemed to be the Station's published card rates for national advertisers in effect on the date the Broadcaster executes its commitment in connection with such advertiser's programs, or the single-time rates then charged or quoted by the Broadcaster to national advertisers for time on the Station, if such rates are lower than the Station's published card rates. (It is understood that if the advertiser uses two or more fifteen-minute units on any day, the total daily amount of time used by the advertiser may, for the purpose of determining the single-time rate to be used in computing the charges to the [fol. 471] advertiser, be treated as an uninterrupted period, and, if two or more fifteen-minute units used by the advertiser fall in different time classifications, the single-time rates in such classifications will be averaged. Any advertiser that shall have completed two hundred sixty broadcasts during a period of fifty-two successive weeks of broadcasting at the Volume Network Rate and shall continue such broadcasting without interruption shall be entitled to receive the Volume Network Rate for 260 broad-

casts for the additional period of successive weeks during which the advertiser uses the same periods of time.

(2) Mutual will charge any other advertiser for time on the Station at the Station's rates for such time in effect on the date the Broadcaster executed a commitment in connection with such advertiser's program or programs, less the applicable discounts customarily allowed by the Broadcaster to advertisers.

These rates will, of course, be subject to the customary 15% agency commission to recognized advertising agencies. The term "advertiser" as used in this contract shall mean the advertiser or the advertising agency signing a contract for an advertiser, as the case may be.

(D) Mutual will pay the Broadcaster for all broadcasting time used by Mutual on the Station a net sum equal to Mutual's actual receipts from advertisers for such time, at the rates specified in paragraph (A) above, less the sum of the following:

(1) —% of such receipts from advertisers;
(2) Line and service charges of $——— per month;
( ) License fees payable by Mutual to the American Society of Composers, Authors and Publishers and other copyright licensing organizations with respect to the broadcasting through the Station of Mutual commercial and sustaining network programs.

If Mutual is, for any reason, unable to collect the entire amount billed to any advertiser (or its advertising agency) for broadcasting time on all participating stations, the receipts for time on the Station will, of course, be deemed to be a pro rata share of the amount actually collected, the [fol. 472] share to be allocated to the Broadcaster depending upon the number of stations broadcasting said programs, the respective time charges of such stations, and the interruptions and appropriations occurring with respect to said programs.

(E) Mutual will furnish a monthly statement to the Broadcaster on or before the last day of each month setting forth the above accountings with respect to the preceding month, and will accompany such statement with the sum, if any, due the Broadcaster.

(F) The Broadcaster will sign a commitment in the form attached hereto in connection with each advertiser's pro-

gram or programs submitted by Mutual and accepted by the Broadcaster and, when Mutual consummates its contract with the advertiser, Mutual will sign and return the commitment to the Broadcaster. Unless Mutual gives the Broadcaster written notice that it desires to terminate the commitment, any commitment (for the sale by the Broadcaster and the purchase by Mutual of time on the Station) which is in force at the date of the termination of this contract shall not be affected in any manner by such termination of this contract; except that thereafter Mutual, in computing its payments to the Broadcaster for such time, shall only be entitled to deduct from Mutual's receipts for such time the percentages and license fees specified in paragraph (D) above, and the actual cost of the temporary line facilities necessary to deliver the advertiser's programs to the Broadcaster.

(G) Notwithstanding the execution of a commitment by the Broadcaster to broadcast any advertiser's program or programs as hereinabove provided, the Broadcaster may refuse to broadcast any such program which, in its opinion, is contrary to the public interest or the Broadcaster may substitute for any such program a program of outstanding local or national importance. The Broadcaster will give Mutual as much notice of the Broadcaster's intention to refuse any program or to substitute another program as circumstances permit.

(H) If for any reason the Broadcaster shall enter into a contract with any advertiser for the broadcasting of any Mutual program (i.e., a program being transmitted over the Mutual lines) under the provisions of which the Broadcaster, instead of Mutual, shall receive the payments made [fol. 473] by the advertiser for broadcasting time on the Station, the receipts of the Broadcaster from such advertising shall (for the purpose of determining the amount of the deductions provided in paragraph (D) above, but for no other purpose) be deemed a part of Mutual's receipts from advertisers for broadcasting time on the Station.

4. If Mutual's receipts from advertisers for time on the Station for any month shall not equal the sum of the deductions provided in paragraph (D) above for such month, the Broadcaster will pay Mutual the deficiency promptly upon the receipt of a statement from Mutual of such deficiency. To secure the prompt payment of any such deficiencies, the Broadcaster will maintain the sum of $——

on deposit with Mutual. Such deposit, if not theretofore exhausted, shall be applied to the payment of any deficiency for the last month of this contract. Any portion of such deposit not so applied shall be refunded to the Broadcaster by Mutual upon the termination of this contract.

5. Mutual agrees to use its best efforts to obtain from its various affiliated stations and to otherwise develop sustaining programs of high quality, including: broadcasts of national and international events, speeches by national and international figures in the fields of government, education, religion, agriculture, and the arts, broadcasts of operas, symphony concerts, and other musical events, dramatic presentations and other educational or entertainment programs of general interest, for broadcasting by the stations composing its network. So long as the Broadcaster shall faithfully perform all of its agreements herein contained, Mutual will transmit to the Broadcaster for broadcasting by the Station such Mutual sustaining programs as may from time to time be transmitted over Mutual's Chicago - ——— line, unless Mutual is prevented from so doing by causes beyond its control, or unless such transmission might involve Mutual or the originating station in a labor dispute. The Broadcaster shall not, without the prior consent of Mutual, broadcast any of these programs as sponsored programs or in any other manner use any of these programs or permit them to be used for commercial purposes, shall not furnish any of these programs to any other station, shall not make any transcription or recording of any of these programs, except for delayed broadcasting [fol. 474] on the Station, and shall not consent to the rebroadcasting of any of these programs by any other station. The Broadcaster agrees to make available to Mutual, for transmission to the other stations affiliated with the Mutual network, the outstanding sustaining programs produced or developed by the Broadcaster.

6. The Broadcaster agrees that during the term of this contract it will not enter into any contract with any person, firm or corporation wherein the Broadcaster agrees to broadcast programs through the Station exclusively for any other network or wherein the Broadcaster gives such network any exclusive option on, or exclusive priority rights over, any broadcasting time on the Station. The Broad-

caster further agrees that it will not discriminate against Mutual and in favor of any other network organization in the sale of its broadcasting time, in that, if it sells broadcasting time to any other network organization, it will, in acting upon requests for the same period of time from Mutual and such other network organization, adhere to the principle of first-come-first-served. The Broadcaster further agrees that it will not make any commitment with respect to any period or periods of time on the Station to any other network organization in violation of Section 3.104 or 3.105 of the Regulations of the Federal Communications Commission. If the Broadcaster shall enter into any contract or agreement with any other network organization or shall enter into any contract or agreement with any person, firm or corporation for the broadcasting of any program to be transmitted to the Station by any other network organization, the Broadcaster agrees to furnish Mutual with a true and complete copy of such contract or agreement within five (5) days after it is executed or made. The Broadcaster further agrees to give Mutual written notice of any sale of broadcasting time on the Station within the Mutual option time made to any other network organization, pursuant to any such contract or agreement. Such notice shall be given to Mutual by the Broadcaster within five (5) days after the commitment to furnish the broadcasting time is made by the Broadcaster and shall specify the period or periods of time to be furnished, the date or dates upon which such period or periods are to be furnished, the network organization to which such period or periods are to be furnished, the advertiser whose program or programs are to be broadcast during said period or periods and [fol. 475] the compensation to be received by the Broadcaster for said period or periods.

7. This agreement shall, unless sooner terminated as hereinafter provided, remain in effect for a period of —— years, ending —— —, 194—, and shall then be renewed on the same terms and conditions for a further period of —— years, and so on for successive further periods of —— years each, unless and until either party shall, at least —— days prior to the expiration of the then current term, give the other party written notice that it does not desire to have the contract renewed for a further period.

8. If any of the licensees of radio stations contributing to the cost of Mutual's program transmission line extend-

ing to —— —— shall cease to make such contributions, Mutual may give written notice to the Broadcaster of Mutual's desire to terminate this contract, such notice to be given by registered mail at least thirty (30) days prior to the date upon which Mutual proposes that the termination shall become effective. This contract will terminate on the effective date specified in Mutual's notice, unless the Broadcaster shall, within ten (10) days after the date of Mutual's notice, deliver to Mutual a binding agreement by the Broadcaster to pay to Mutual, during the remainder of the term of this contract, an additional amount each month equal to the contributions theretofore made by the licensee or licensees ceasing to make such contributions.

9. If the ownership or control of the Station or of the controlling interests in the capital stock of the Broadcaster shall be voluntarily or involuntarily transferred from its present holder or holders, Mutual may terminate this contract by giving written notice to the Broadcaster by registered mail at least thirty (30) days prior to the date upon which such termination is to become effective.

10. The Broadcaster agrees that it will not use the name "Mutual Broadcasting System" or any similar name, except pursuant to the terms and conditions of this contract and in a manner consistent with its provisions.

11. It is understood and agreed that neither of the parties is the agent or representative of the other for any purpose whatsoever and that no partnership relationship exists between the parties.

[fol. 476] 12. This agreement is subject to all present and future rules, regulations, and orders of the Federal Communications Commission and to all laws of the United States of America now or hereafter in force.

In Witness Whereof, the parties hereunto have executed this contract, or have caused it to be executed by their duly authorized officers, as of the day and year first above written, on the respective dates indicated after their signatures.

MUTUAL BROADCASTING SYSTEM, INC.
By .....
Date .....

.....
By .....
Date .....

Summary of Available Full-Time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage[1]	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
Ten or More Full-time Commercial Stations					
New York, N. Y.[2]	11,690,520	1	6	14	3
Los Angeles, Cal.	2,904,596	3	8	13	4[3]
Nine Full-time Commercial Stations					
Chicago, Ill.[2]	4,499,126	2	5	9	5
San Francisco-Oakland, Cal.	1,428,525	9	8	9	3
Eight Full-time Commercial Stations					
Boston, Mass.[2]	2,350,514	5	6	8	3
Seven Full-time Commercial Stations					
Philadelphia, Pa.[2]	2,898,644	4	5	7	3
Six Full-time Commercial Stations					
Detroit, Mich.[2]	2,295,867	6	3[4]	6[4]	3
Washington, D. C.[2]	907,816	13	4	6	3
Kansas City, Kans.-Kansas City, Mo.[2]	634,093	18	5[5]	6[5]	3[5]
Seattle, Wash.	452,639	24	5	6	3
Five Full-time Commercial Stations					
Pittsburgh, Pa.[2]	1,994,060	7	4[6]	5	3
St. Louis, Mo.[2]	1,367,977	8	4	5	3
Baltimore, Md.[2]	1,046,692	11	3	5	3
Minneapolis-St. Paul, Minn.[2]	911,077	12	4	5	3
Buffalo-Niagara Falls, N. Y.[2]	857,719	14	3	5	4[3]
Cincinnati, O.[2]	789,309	16	4	5	3
New Orleans, La.	540,030	20	3	5	3

[fol. 478]

Portland, Ore.	406,406	30	4	5	3
Denver, Colo.	384,372	32	4	5	3
San Antonio, Tex.	319,010	42	2	5	2
	Four Full-time Commercial Stations				
Providence, R. I.[8]	711,500	17	0[9]	4	3
Scranton-Wilkes-Barre, Pa.	629,581	19	0	4[10]	1[10]
Hartford-New Britain, Conn.[2]	502,193	22	2	4	3
Indianapolis, Ind.[3]	455,357	23	4	4	3
Atlanta, Ga.	442,294	25	3	4	3
Louisville, Ky.[11]	434,408	26	2	4	3
Albany-Schenectady-Troy, N. Y.[5]	431,575	27	1	4	3
Springfield-Holyoke, Mass.[13]	394,623	31	2	4	2
Dallas, Tex.	376,548	33	4[14]	4[14]	3[14]
Memphis, Tenn.	332,477	39	3	4	3
Syracuse, N. Y.[15]	258,352	48	4	4	2
Oklahoma City, Okla.	221,229	53	4	4	3
Tampa-St. Petersburg, Fla.	209,693	56	4	4	3
Fort Worth, Tex.	207,677	57	4[14]	4[14]	3[14]
Tacoma, Wash.	156,018	76	2	4	0
Spokane, Wash.	141,370	84	3	4	3

Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage[1]	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
	Three Full-time Commercial Stations				
Cleveland, O.[2]	1,214,943	10	3	3	3
Milwaukee, Wis.	790,336	15	3	3	3
Houston, Tex.	510,397	21	3	3	3
Rochester, N. Y.[18]	411,970	28	2	3	2
Birmingham, Ala.	407,851	29	2	3	3
Youngstown, O.	372,428	34	2	3	2
Akron, O.[15]	349,705	36	2	3	2
Worcester, Mass.[16]	306,194	44	2	3	2
Omaha-Council Bluffs, Nebr.-Ia.[11]	287,698	45	2	3	2
San Diego, Cal.	256,368	49	3	3	1
Miami, Fla.	250,537	50	3	3	3
Richmond, Va.[12]	245,674	51	3	3	3
Nashville, Tenn.	241,769	52	2	3	2
Salt Lake City, Utah	204,488	58	3	3	3
Jacksonville, Fla.	195,619	63	1	3	3
Chattanooga, Tenn.	193,215	64	2	3	2
Tulsa, Okla.	188,562	66	2	3	3
Des Moines, Ia.[3]	183,973	68	3	3	3
Duluth-Superior, Minn.-Wis.	157,098	75	3	3	2
Knoxville, Tenn.	151,829	78	3	3	2
Beaumont-Port Arthur, Tex.	138,608	85	3	3	1
Wichita, Kans.	127,308	92	3	3	2

[fol. 480]

Little Rock, Ark.	126,724	93	3	3	2
Phoenix, Ariz.	121,828	94	3	3	2
Shreveport, La.	112,225	101	3[17]	3[17]	2[17]
Springfield, Mo.	70,514	135	3	3	1
Two Full-time Commercial Stations					
Columbus, O.[12]	365,796	35	2	2	2
Toledo, O.[12]	341,663	37	2	2	2
Lowell-Lawrence-Haverhill, Mass.	334,969	38	2	2	1
Allentown-Bethlehem-Easton, Pa.	325,142	40	1	2	1
Norfolk-Portsmouth-Newport News, Va.	323,326	41	2	2	1
Fall River-New Bedford, Mass.	272,648	46	2	2	0
Dayton, O.[15]	271,513	47	2	2	2
Bridgeport, Conn.[13]	216,621	54	1	2	1
Grand Rapids, Mich.	209,873	55	2	2	1
Wheeling, W. Va.	196,340	62	1	2	2
Wilmington, Del.[16]	188,974	65	2	2	1
Davenport-Rock Island-Moline, Ia.-Ill.[13]	174,995	70	2	2	1
Harrisburg, Pa.[13]	173,367	71	2	2	2
Huntington-Ashland, W. Va.-Ky.	170,979	72	1	2	0
Sacramento, Cal.	158,999	74	1	2	2

Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941—Continued

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage[1]	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
Two Full-time Commercial Stations (Continued)					
Waterbury, Conn.	144,822	82	1	2	1
Evansville, Ind.	141,614	83	2	2	2
Charleston, W. Va.	136,332	86	1	2	2
Fort Wayne, Ind.[13]	134,385	88	1	2	2
Erie, Pa.	134,039	89	2	2	2
Savannah, Ga.	117,970	95	2	2	2
El Paso, Tex.	115,801	96	2	2	2
Mobile, Ala.	114,906	97	2	2	1
Charlotte, N. C.	112,986	99	2[18]	2[18]	2[18]
Roanoke, Va.	110,593	102	2	2	1
Winston-Salem, N. C.	109,833	104	2	2	1
Portland, Me.[16]	106,566	105	2	2	2
Atlantic City, N. J.	100,096	108	2	2	1
Charleston, S. C.	98,711	109	2	2	2
Fresno, Cal.	97,504	110	2	2	2
Montgomery, Ala.	93,697	111	2	2	2
Columbia, S. C.	89,555	114	2	2	2
Springfield, Ill.	89,484	115	2	2	1
Lincoln, Nebr.[12]	88,191	116	2	2	1
Jackson, Miss.	88,003	117	2	2	2
Augusta, Ga.	87,809	118	2	2	2

[fol. 482]

Sioux City, Ia.	87,791	119	2	2	1
Manchester, N. H.	81,932	122	2	2	2
Asheville, N. C.	76,324	128	2	2	2
Macon, Ga.	74,830	129	2	2	1
Corpus Christi, Tex.	70,677	134	2	2	1[19]
Amarillo, Tex.	53,463	140	2	2	1
Raleigh, N. C.[22]	46,897	162	2[20]	2[20]	1[20]
Dubuque, Ia.[22]	43,892	173	2	2	1
Tucson, Ariz.[22]	36,818	223	2	2	2
Orlando, Fla.[22]	36,736	225	2	2	2
Albuquerque, N. M.[22]	35,449	232	2[21]	2[21]	2[21]
Santa Barbara, Cal.[22]	34,958	236	2	2	1
Greenville, S. C.[22]	34,734	237	2	2	1
Bangor, Me.[22]	29,822	289	2	2	2
Bakersfield, Cal.[22]	29,252	293	2	2	1
Hot Springs, Ark.[22]	21,370	383	2	2	1
Albany, Ga.[22]	19,055	432	2	2	1
One Full-time Commercial Station					
New Haven, Conn.	308,228	43	0	1	0
Canton, O.	200,352	59	1	1	0
Trenton, N. J.	200,128	60	1	1	0

Summary of Available Full-time Commercial Stations in Metropolitan Districts and the Number of Such Stations Owned by or Affiliated with Columbia and National as of November 1, 1941—Continued

Metropolitan District	Population	Rank according to population	Number of full-time commercial stations having adequate coverage[1]	Total number of full-time commercial stations	Number of stations owned by or affiliated with Columbia and National
One Full-time Commercial Station (Continued)					
Utica-Rome, N. Y.	197,128	61	1	1	1
Flint, Mich.	188,554	67	1	1	1
Reading, Pa.	175,355	69	1	1	1
Peoria, Ill.	162,566	73	1	1	1
Saginaw-Bay City, Mich.	153,388	77	1	1	1
Johnstown, Pa.	151,781	79	1	1	1
South Bend, Ind.	147,022	80	1	1	1
Binghamton, N. Y.	145,156	81	1	1	1
Racine-Kenosha, Wis.	135,075	87	1	1	0
Lancaster, Pa.	132,037	90	1	1	1
San Jose, Cal.	129,367	91	1	1	0
Altoona, Pa.	114,094	98	1	1	1
Lansing, Mich.	110,356	103	1	1	1
Austin, Tex.	106,193	106	1	1	0
Rockford, Ill.	105,259	107	1	1	0
York, Pa.	92,627	112	1	1	1
Columbus, Ga.	92,478	113	1	1	1
St. Joseph, Mo.	86,991	120	1	1	0
Berkeley, Cal.	85,547	[2]	1	1	0
Terre Haute, Ind.	83,370	121	1	1	1
Stockton, Cal.	79,337	123	1	1	0
Madison, Wis.	78,349	124	1	1	1

[fol. 484]

Topeka, Kans.	77,749	125	1	1	1
Springfield, O.[12]	77,406	126	1	1	1
Kalamazoo, Mich.	77,213	127	1	1	1
Cedar Rapids, Ia.[11]	73,219	130	1	1	1
Greensboro, N. C.	73,055	131	1	1	0
Galveston, Tex.	71,677	132	1	1	0
Waco, Tex.	71,114	133	1	1	1
Durham, N. C.	69,683	136	1	1	0
Decatur, Ill.	65,764	138	1	1	1
Pueblo, Colo.	62,039	139	1		
	No Full-time Commercial Stations				
Hamilton-Middletown, O.	112,686	100	0	0	0
Waterloo, Ia.	67,050	137	0	0	0

[fol. 485]

Summary of Cities Having Population of 50,000 or More in Which National and Columbia Restrictive Contracts with Affiliates Permit No Access, or Only a Limited Access, by Mutual
(November 1, 1941)

I

Cities in order of size having a population of 50,000 or more in which Mutual has no outlet, in which Columbia or National, or both have restrictive contracts with full-time outlets, and in which no independent full-time outlet is available.

Youngstown, O.
Toledo, O.
Dayton, O.
Miami, Fla.
Utica-Rome, N. Y.
Wheeling, W. Va.
Flint, Mich.
Reading, Pa.
Peoria, Ill.
Sacramento, Calif.
Saginaw-Bay City, Mich.
Johnstown, Pa.
South Bend, Ind.
Charleston, W. Va.
Fort Wayne, Ind.
Erie, Pa.
Savannah, Ga.
El Paso, Tex.
Altoona, Pa.
Lansing, Mich.
Portland, Me.
Charleston, S. C.
Montgomery, Ala.
Columbus, Ga.
Jackson, Miss.
Augusta, Ga.
Terre Haute, Ind.
Madison, Wis.
Springfield, O.
Kalamazoo, Mich.
Greensboro, N. C.
Durham, N. C.
Pueblo, Colo.
Topeka, Kan.[24]
Asheville, N. C.

II

Cities in order of size having a population of 50,000 or more in which Mutual has a local or part-time station as an outlet, in which Columbia or National, or both, have restrictive contracts with full-time regional or clear channel outlets, and in which no full-time regional or clear-channel facilities are available.

New Orleans, La.
Scranton-Wilkes-Barre, Pa.[25]
Hartford-New Britain, Conn.
Atlanta, Ga.
Louisville, Ky.
Albany-Schenectady-Troy, N. Y.
Rochester, N. Y.
Columbus, O.
Akron, O.
Lowell-Lawrence, Mass.
Allentown, Pa.
Norfolk, Va.
San Antonio, Tex.
Oklahoma City, Okla.
Chattanooga, Tenn.
Wilmington, Del.
Duluth-Superior, Minn.-Wis.
Knoxville, Tenn.
Little Rock, Ark.
Mobile, Ala.
Roanoke, Va.
Winston-Salem, N. C.
Sioux City, Iowa
Lincoln, Neb.
Macon, Ga.
Amarillo, Tex.

[fol. 486]

III

Cities in order of size having a population of 50,000 or more in which Mutual has as an outlet a station also used by another major network, in which Columbia or National, or both, have restrictive contracts with or own full-time regional or clear-channel outlets, and in which:

(a) There is no full-time independent station available.

Cleveland, O.
Houston, Tex.
Birmingham, Ala.
Richmond, Va.
Salt Lake City, Utah
Jacksonville, Fla.
Tulsa, Okla.
Des Moines, Ia.
Harrisburg, Pa.
Binghamton, N. Y.
Evansville, Ind.
Lancaster, Pa.
Charlotte, N. C.
York, Pa.
Columbia, S. C.
Manchester, N. H.
Cedar Rapids, Ia.

(b) The only independent full-time outlet available is a local station;

Memphis, Tenn.
Omaha, Nebr.
Bridgeport, Conn.
Spokane, Wash.
Corpus Christi, Tex.

Footnotes

[1] Although the determination of the number of full-time stations having adequate coverage throughout the various metropolitan areas presents several problems (due principally to doubts as to whether the low power local stations have adequate coverage), liberality has been exercised, and where doubt exists, the doubt has been resolved, in most instances, in favor of adequate coverage. In the preparation of this appendix, outstanding construction permits have been considered as authorizing operation in accordance therewith.

[2] Basic on both NBC Red and Blue, and CBS.

[3] Columbia owns KNX. KMPC is available as an alternate or additional station with KNX.

[4] These figures do not include CKLW, Windsor, Canada, Mutual's Detroit outlet. This station, which prior to 1935 was a Columbia affiliate, is used by Mutual because of the insufficient number of full-time stations having adequate coverage of the Detroit Metropolitan District.

Footnotes—Continued

[6] These figures include WREN, the NBC basic Blue network outlet. With the exception of one-half hour on weekdays from 2:30 to 3:00 p.m., WREN operates unlimited time.

[6] The coverage of all Pittsburgh stations, with the exception of KDKA, is doubtful because of the size of the Pittsburgh Metropolitan District.

[7] Basic on both NBC Red and Blue.

[8] Two stations are affiliated with Columbia, WGR and WKBW.

[9] Although the stations in this district adequately cover the cities in which they are located, it is doubtful whether their coverage is adequate for the entire metropolitan district. The only full-time station not affiliated under restrictive contracts with National or Columbia is WFCI in Pawtucket, R. I., a city adjacent to Providence.

[10] The Columbia station is WGBI, a station sharing time with WQAN.

[11] Basic on NBC Red and CBS.

[12] Basic on CBS.

[13] Basic on NBC Blue.

[14] These figures include KRLD and KGKO.

[15] Basic on NBC Blue and CBS.

[16] Basic on NBC Red.

[17] These figures include KWKH, 50 kw.

[18] This includes WBT, 50 kw.

[19] KRIS, a regional station, is affiliated with the Red and Blue networks of National. The same station is also used by Mutual. KEYS, a local station, has only recently been authorized to operate.

[20] This station is WPTF, 50 kw.

[21] This includes KOB, 50 kw.

[22] These cities are not large enough to be classified as metropolitan districts, and are included because of the presence of more than one full-time commercial station.

[23] Berkeley is not listed as a metropolitan area; it would rank 121st in population.

[24] Columbia affiliate, operates part-time.

[25] WGBI, the Columbia affiliate, shares time with WQAN but uses most of the available time.

[fol. 488] APPENDIX G

First Cancellation of the Ballantine Program

J. Walter Thompson Company

420 Lexington Avenue,
New York,
October 23, 1941.

Mr. Sidney P. Allen, Mutual Broadcasting System, 1440 Broadway, New York City.

DEAR MR. ALLEN:

We regret that it is necessary to send you the attached cancellation of the Ballantine program. However, as discussed over the telephone we plan to move the program from the Mutual Network after the broadcast of Friday, October 31.

Whenever you are able to discuss shortrate and payment details, please let me know.

Sincerely yours, J. Walter Thompson Company, (S.) Linnea Nelson.

L. Nelson: AW.

J. Walter Thompson Company

420 Lexington Avenue,
New York.

Radio Suspension Order

October 23, 1941.

Mutual Broadcasting System, 1440 Broadway, New York City.

GENTLEMEN: RE: P. BALLANTINE & SONS:

Kindly cancel broadcasting ordered for the above client as follows:

[fol. 489] One-half hour—9:30 to 10:00 P. M. New York Time.

44 times—once a week—every Friday.

November 7, 1941 to and including September 4, 1942.

Over Mutual coast-to-coast Network—77 stations.

There is to be no broadcasting after October 31, 1941.

This was ordered on June 24, July 29, August 21 and September 12, 1941.

Kindly sign and return the enclosed copy.
J. Walter Thompson Company, Per (S.) Linnea Nelson.

[fol. 490] APPENDIX H

Final Cancellation of the Ballantine Program

J. Walter Thompson Company

420 Lexington Avenue,
New York,
October 27, 1941.

Mr. Sidney P. Allen, Mutual Broadcasting System, 1440 Broadway, New York City.

DEAR MR. ALLEN:

Attached is radio suspension order dated October 27th, which cancels and supersedes the one previously given you dated October 23rd.

Won't you please return the October 23rd copy unsigned and the October 27th copy with signature.

Sincerely yours, J. Walter Thompson Company, (S.) Linnea Nelson.

L. Nelson:AW.
cc:Mr. Wood.

J. Walter Thompson Company

420 Lexington Avenue,
New York.

Radio Suspension Order

October 27, 1941.

Mutual Broadcasting System, 1440 Broadway, New York City.

GENTLEMEN: RE: P. BALLANTINE & SONS:

Kindly cancel broadcasting ordered for the above client as follows:

[fol. 491] One-half hours—9:30 to 10:00 P. M. New York Time.

39 times—once a week—every Friday.
December 12, 1941 to and including September 4, 1942.

Over Mutual coast-to-coast Network—77 stations.
There is to be no broadcasting after December 5, 1941.
This was ordered on June 24, July 29, August 21 and September 12, 1941.

Kindly sign and return the enclosed copy.
J. Walter Thompson Company, Per (S.) Linnea Nelson.

[fols. 492] APPENDIX I

Excerpts from Trade Journals on Loss of Ballantine Program

Broadcasting.
October 27, 1941.
Page 50.

Ballantine Quits Mutual for Blue

P. Ballantine & Sons, Newark brewer, is shifting its *Three Ring Time* series from MBS to NBC-Blue, beginning on the latter network Nov. 7. Series, starring Charles Laughton, Milton Berle and Bob Crosby's orchestra, will be broadcast for 52 weeks on more than 20 Blue stations, Fridays, 8:30-9 p. m., a half-hour earlier than its present Friday evening spot on MBS.

Agency in charge of the account, J. Walter Thompson Co., New York, had nothing to say about plans for a substitute program on MBS for the duration of the contract with that network, which runs until mid-December.

In accepting the Ballantine program, NBC-Blue is deviating from the NBC code of policies and standards, which states that "alcoholic beverages may not be advertised on any network program," although individual NBC M & O stations have accepted beer advertising for local broadcasts. When this prohibition was adopted early in 1939, NBC explained that network programs must be acceptable to all parts of the country and at all times, whereas beer advertising was acceptable in some communities but not in others and was much more acceptable at some times than at others.

Variety.
October 29, 1941.
Page 31.

Mutual-NBC Beer Brawl

Bitter Charges on NBC's Ways

One of Radio's Name-Calling Competitive Situations Develops as Blue Wins Account—Ballantine Will Finish 13-Week Cycle, However

[fol. 493] "Fly" in the Suds

Radio was faced last week with one of its bitterest competitive squabbles when the J. Walter Thompson agency disclosed that the Ballantine program was switching suddenly from the Mutual Network to the NBC Blue. The furor subsided Monday (26) as NBC took the position that it would prefer to have Ballantine complete its present 13-week cycle on Mutual and that it did not want to be a party to an account's abrupt walkout from a competitive network under the circumstances that prevail.

The sudden dissipation of the proposed immediate transfer was preceded by a vigorous bombardment of charges from Mutual, with the Blue network the principal target. That the event possessed nasty litigation and publicity possibilities was immediately apparent to all when Mutual accused NBC of going to the extreme of reversing its own policy against beer advertising to wean away the account, of giving guarantees to the agency and the account against any action for damages, and of taking the program from stations presently receiving it through Mutual only to feed it back a half-hour earlier the same night at 40% less compensation to the station. The guarantee angles were stoutly denied by both NBC and the Thompson agency.

MBS' Fear

Charges of "dirty pool" were especially stressed by Mutual because of its fear that the blow will be used by rival radio salesmen and echoed by the thoughtless, including radio and other columnists, as a disparagement of Mutual. The Ballantine program with Charles Laughton, Milton Berle, Shirley Ross and Bob Crosby, was not only an important account financially but brought Mutual a name-

studded cast, something extremely vital to its expansion and prestige.

The Ballantine blow was followed by rumors that NBC would go even further in competitive appeals to Coca Cola, the second big name-studded series which Mutual lined up for this season. This program has not yet begun broadcasting. Both NBC and CBS tried desperately to land the Coca-Cola contract but failed, because in some measure [fol. 494] ASCAP music was unavailable on NBC and CBS and was available on Mutual. Personal acrimonies growing out of earlier phases of the ASCAP situation also played a part.

Sudden switch of the Ballantine Beer program may also become embroiled as an issue in the current controversy over the Federal Communications Commission's new regulations on network broadcasting. The Mutual management and legal staff have held several huddles on the matter but no decision has been made as to what trend the web's loss of the Ballantine business will take.

J. Walter Thompson, agency on the Ballantine account, had announced that the show will move into the Blue's Friday 8:30 to 9 p. m. spot Nov. 7. It would have made the first time a program had been transferred from one network to another (competitive) within the initial 13-week cycle. Acceptance of the Ballantine account involves a drastic reversal in policy on the part of NBC. Latter network had been offered the business before the program went on Mutual five weeks ago but NBC at the time refused to budge from the policy tabooing beer which has been in effect since 1936. Other recent revisions of NBC policies, but all of which have been confined to the Blue link concern the acceptance of laxative accounts and the use of recordings over a hookup.

Says Thompson

In defending its position the Thompson agency pointed out last week that the move was in line with an understanding it had with NBC at the time the agency failed to obtain facilities on the Blue for Ballantine. According to the agency, NBC was informed that if it ever changed its policy on beer to let Thompson know immediately.

Thompson got the word from NBC last Tuesday (21) and, according to the Mutual version, was given 48 hours in which to turn in an order for the Friday evening period.

The agency asked Mutual for a release from its contract, which covered 52 weeks but bound the account only for 13 weeks, but Mutual not only turned down the request but advised Thompson that the account would be held liable for the billings entailed in the remaining five weeks of the 13-week cycle. This obligation amounts to $45,800. Ballantine's appropriation for time over the 52 weeks is $200,000.

When Thompson, according to Mutual, asked for the re- [fol. 495] lease it gave as its reason for switching networks the fact that the Ballantine program had been dropped by the Blue's affiliates in Providence, Cleveland, Bridgeport and Jacksonville. Mutual took the matter up with Ballantine Friday (24) and the account stated that it would go along with the agency on the proposition. The last ratings on the Ballantine show have been 2.9 on the Co-operative Analysis of Broadcasting and 4.8 on the C. E. Hooper reports.

Variety.
October 29, 1941.
Page 38.

The Radio Trade is Discussing: Mutual's loss of its one big Coast show to NBC, the Ballantine ale, and the expectation that other beer accounts may go NBC.

[fol. 496] APPENDIX J

Excerpt from Trade Journal on March of Time Program

Broadcasting.
October 13, 1941.
Page 66.

NBC Relaxes Rule for Time Series

To cooperate with Time Inc. and Young & Rubicam in making the March of Time, which returned to the air last week as a half-hour Thursday evening Blue Network program, as effective as possible, NBC has relaxed its rules against dramatizations of war scenes and impersonations of world figures.

Series will also on occasion utilize recordings of speeches and of songs and music necessary for authentic radio presentation of current events, although recordings are usually forbidden from the networks except as sound effects.

Everything possible to make these new *March of Time* broadcasts realistic and impressive will be done, according to NBC, where it was explained that when the sponsor is a publishing company with full realization of its responsibility to the public it is entitled to special consideration in instances where application of the customary network rules would adversely affect the program. Each such case will be considered as it arises on its own merits, it was stated, with decisions being made as necessary from week to week.

[fol. 497] APPENDIX K

Excerpts from Trade Journals on Coca-Cola Program

Variety.
October 8, 1941.
Page 24.

Blue Expects Every Affiliate to Do Its Duty to Sterling Products

NBC station relations department disclosed last week that it proposes to have a showdown with those Blue network affiliates that pass up the two Sterling Products half-hours for the Coca Cola series which will clear through Mutual. These stations have already been given their 28-day removal notices together with a warning that NBC expects them to live up to the terms of their contract.

The Blue stations involved have guaranteed to deliver 10 p. m. across the board to Mutual for the beverage account, which starts Nov. 3. After Mutual obtained the guarantees the Blue sold the 10 to 10:30 segments, Monday and Wednesday, to Sterling with Oct. 20 the starting date.

Broadcasting.
October 13, 1941.
Page 14.

Coca Cola Series Conflicts on Blue

NBC to Hold Stations for Sterling Products Pair

Stations which are affiliated both with NBC-Blue and MBS and which have been sold as outlets for both the Coca-

Cola broadcasts on Mutual and the Sterling Products broadcasts on the Blue have received notice from NBC they will be expected to carry the Sterling Products programs.

In sending the 28-day removal notices to the six stations involved, NBC pointed out that the two Blue programs, *Monday Merry-Go-Round* for Dr. Lyons' toothpowder and *Melody Hour* for Bayer's aspirin, occur at 10-10:30 p. m. on Monday and Wednesday evenings respectively, which is network time, and that the stations are obliged to carry them under the terms of their affiliation contracts with NBC.

[fols. 498-499] Other Disputes Solved

These programs start on Oct. 20 and 22. The Mutual Coca Cola series, to begin Nov. 3, calls for 10:15-10:30 p. m. broadcasts Monday through Friday, and 10-10:30 p. m. on Saturday. Blackett-Sample-Hummert, New York, is the agency for the programs on the Blue; D'Arcy Adv. Co., St. Louis, handles the Coca Cola advertising.

Signing of the Wednesday evening 10-10:30 program relieves NBC of the necessity of settling a dispute between R. J. Reynolds Tobacco Co. and American Tobacco Co.

Sale of the Wednesday evening spot to Sterling got NBC out of the middle of a dispute between two tobacco companies over seven Blue outlets in the West. When R. J. Reynolds Tobacco Co. moved its *Penthouse Party* to the Blue on Wednesdays, 9:30-10 p. m., it requested that these stations be removed from the schedule of the Kay Kyser show, broadcast 10-11 p. m. Wednesdays, sponsored by American Tobacco Co. for Lucky Strikes, under the NBC rule prohibiting continuous broadcast of competitive products. Latter program is a Red Network show, but used the Blue stations in the Western cities as supplementary outlets. When Sterling bought the Blue network 10-10:30 and preempted these stations, the contiguity was removed, automatically ending the dispute.

[fol. 500] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

REPLY AFFIDAVIT OF FRANK STANTON

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss.:

Frank Stanton, being duly sworn, deposes and says:

I am the Director of Research of Columbia Broadcasting System, Inc. (hereinafter sometimes called "CBS" or "Columbia") and I have been its Director of Research since November, 1938. I am also a member of the Advisory Board of the Office of Radio Research of Columbia University. I am fully familiar with the records of the operations of Columbia and also, through available sources, with the records of operations of National Broadcasting Company, Inc. (hereinafter sometimes called "NBC") and of Mutual Broadcasting System, Inc. (hereinafter sometimes called "MBS" or "Mutual"). I am also familiar with records and statistical material and methods relating to program preferences of listeners and habits of radio listening. This affidavit is in reply to affidavits submitted herein [fol. 501] by Mutual in opposition to the motion of Columbia for a temporary injunction.

1. Record of Sales of Network Time to Advertisers.

The Mutual Broadcasting System, which began its operations in the latter part of 1934 and which completed its first full year of operations in 1935, has shown a record of uninterruptedly expanding business during the subsequent years. The percentage increase of the gross sales of network time of Mutual compared with the percentage increase (or decrease) of gross sales of network time of CBS and the Red network and the Blue network of NBC, for each of the years 1936 to 1941, inclusive, compared in each case with the gross sales for the preceding year, is as follows:

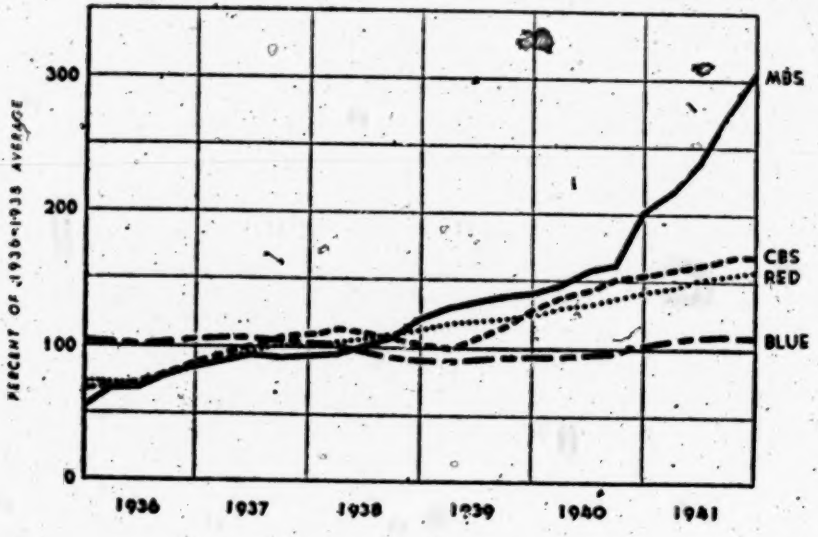
Percentage Increase (or Decrease) over Preceding Year of Gross Sales of Network Time

	MBS	CBS	Red	Blue
1936	53.1%	31.4%	16.1%	2.0%
1937	13.1	24.0	20.0	— 3.4
1938	30.4	—4.8	14.8	—10.5
1939	14.0	26.3	10.3	5.6
1940	43.1	18.8	12.8	9.4
1941	53.2	8.7	10.3	3.0
Average Increase 1936-1941	34.5%	17.4%	14.1%	1.0%

A table showing the percentage changes in the gross sales of network time for each month during this period is attached hereto as Exhibit A.

The growth of the business of Mutual compared to that of CBS and NBC is also shown by the following chart which plots the trend of gross sales of network time for Mutual compared with that of CBS and of the Red network and the Blue network of NBC.

[fol. 502] Trend of Gross Sales of Network Time
MBS Compared with CBS, NBC-Red and NBC-Blue
Based on Preceding 12 Months' Sales at Each Plotted Month
Index: 3-Year Average, 1936-38=100%
Separately for MBS, CBS, NBC-Red and NBC-Blue



The supporting tables for this chart are annexed hereto as Exhibits B, C, D, E, F, G, H and I.

The record of gross sales of network time for the years 1935 to 1941, inclusive (expressed to the nearest thousand), is as follows:

Gross Sales of Network Time
(Expressed in Thousands of Dollars)

	MBS	CBS	NBC Red	NBC Blue
1935	$1,293	$17,638	$19,499	$11,650
1936	1,979	23,168	22,646	11,878
1937	2,239	28,722	27,172	11,479
1938	2,920	27,345	31,187	10,275
1939	3,330	34,540	34,399	10,846
1940	4,767	41,026	38,800	11,863
1941	7,301	44,584	42,777	12,223

[fol. 503] Annexed hereto as Exhibits J, K, L and M are supporting tables showing gross sales of network time for each month during this period.

Since 1935 Mutual's gross sales, expressed in percentage of gross sales of CBS and in percentage of gross sales of NBC, have greatly increased and now amount to more than twice Mutual's sales in 1935 in relation to the other networks. The record for each period is as follows:

Mutual Broadcasting System Gross Sales of Network Time
Expressed as Percentage of Gross Sales

	Of CBS	Of NBC Red	Of NBC Blue
1935	7.3%	6.6%	11.1%
1936	8.5	8.7	16.7
1937	7.8	8.2	19.5
1938	10.7	9.4	28.4
1939	121	116	
1940	11.6	12.3	40.2
1941	16.4	17.1	59.7

From the foregoing tables and chart it is apparent that Mutual has been able to compete successfully with the other networks and this is particularly true in the case of

the Blue network of NBC. Mutual has been able to increase its sales from one-ninth of the Blue sales in 1935 to more than one-half of the Blue sales in 1941.

2. Number of Mutual's Affiliated Stations.

Since 1935 the number of stations affiliated with the Mutual network and regularly offered by Mutual as network outlets for advertisers has shown a steady increase each year. The number of stations so affiliated and the number affiliated with Columbia (as reported by "Radio Advertis- [fol. 504] ing Rates and Data" published by Standard Rate & Data Service) have been at the end of each of the years 1935 to 1940, inclusive, and at November, 1941, as follows:

	Number of affiliated stations	
	MBS*	CBS
1935	5	98
1936	32	100
1937	77	109
1938	104	112
1938	121	116
1940	147	120
1941 (November)	178	121

* The number of stations affiliated with Mutual, as reported by the Standard Rate and Data Service, varies somewhat from the number reported by Mutual, itself. In Mutual's "Network News Weekly" for the week of December 28, 1941, Mutual reports that it has 193 stations on its network and states:

"Mutual now has 25 more stations than it had associated with it a year ago. In December, 1940, 168 stations were connected with the network. In 1939 there were 118. The network began in 1934 with four stations.

"1941 saw three of the nation's pioneer stations, WGR, Buffalo, WFBR, Baltimore, and WCAE, Pittsburgh, all 22 years old, each possessing 5,000 watts power, switch to Mutual.

"For the first time, Mutual programs were regularly heard in Florida when five outlets there joined the network.

"The total number of affiliate stations which belong to the cooperative Mutual network is now 193."

On account of expiration of affiliation contracts, each station affiliated with Columbia in 1935 has been free, one or more times during the period of Mutual's operations, to leave the CBS network and join any other network offering it a more attractive affiliation.

Frank Stanton.

Subscribed and sworn to before me this 10th day of January, 1942. George A. Burwell, Notary Public. N. Y. Co. Clk's No. 527, Reg. No. 3B800; Kings Co. Clk's No. 119, Reg. No. 3459; Bronx Co. Clk's No. 62, Reg. No. 248B43; Queens Co. Clk's No. 2167, Reg. No. 8330. Certificates filed in Westchester and Richmond Counties. Commission Expires March 30, 1943. (Notarial Seal.)

[fol. 505] EXHIBIT "A" TO REPLY AFFIDAVIT OF FRANK STANTON

Trend of Gross Sales of Network Time, Shown by Per cent Change, Each Month, from Same Month of Preceding Year
MBS Compared with CBS, NBC-Red, and NBC-Blue.
1936–1941

Month	1936 MBS	1936 CBS	1936 NBC Red	1936 NBC Blue	1937 MBS	1937 CBS	1937 NBC Red	1937 NBC Blue	1938 MBS	1938 CBS	1938 NBC Red	1938 NBC Blue
	%	%	%	%	%	%	%	%	%	%	%	%
January	+143.1	+ 7.5	− 5.3	−10.8	+35.4	+25.1	+37.7	+21.9	+25.2	+21.1	+10.9	− 0.7
February	+143.8	+15.4	− 0.9	− 2.7	+43.2	+18.6	+33.9	+ 0.5	+10.3	+18.4	+10.2	− 3.0
March	+103.2	+18.7	+ 1.9	− 2.0	+29.3	+17.9	+32.2	− 3.6	− 5.7	+18.5	+ 8.1	− 1.2
April	+ 18.6	+20.8	+ 6.1	− 4.1	+42.9	+31.4	+30.8	− 0.6	− 5.0	− 5.4	+ 6.7	−12.5
May	+ 17.1	+36.0	− 1.6	− 9.5	+19.2	+46.3	+37.0	+ 4.5	+25.2	− 4.6	+16.2	−17.5
June	+ 15.4	+40.9	− 1.3	− 4.5	+11.4	+64.8	+48.3	− 4.7	+72.6	−14.4	+15.4	−18.0
July	+ 74.6	+42.1	+14.7	+ 1.7	− 7.3	+53.8	+25.2	−15.7	+63.7	−31.2	+17.7	−15.7
August	+ 69.4	+40.3	+22.8	+14.8	−20.5	+58.6	+34.7	−20.5	+70.1	−27.2	+13.1	−17.1
September	+103.6	+69.2	+55.1	+ 1.6	−21.3	+10.3	+ 3.3	−11.2	+50.4	−21.0	+16.5	−26.6
October	+ 51.1	+42.7	+33.2	+32.7	−12.1	− 9.1	− 8.1	−12.7	+45.6	− 4.7	+25.9	−12.7
November	+ 31.8	+41.1	+45.1	+ 6.4	+13.2	+ 9.2	− 4.9	+ 3.0	+39.9	− 7.6	+25.7	− 6.5
December	+ 10.3	+29.0	+33.8	+ 5.0	+26.9	+14.5	+ 4.8	− 3.2	+37.6	− 9.3	+12.5	− 6.3
Total	+ 53.1	+31.4	+16.1	+ 2.0	+13.1	+24.0	+20.0	− 3.4	+30.4	− 4.8	+14.8	−10.5

Example: In January 1938, gross time sales of the Mutual Broadcasting System were 143.1% above January 1935, while sales of CBS increased 7.5%, NBC-Red decreased 5.3% and NBC-Blue decreased 10.8%.

[fol. 506]

EXHIBIT A (Continued)

Month	1939 MBS %	1939 CBS %	1939 NBC Red %	1939 NBC Blue %	1940 MBS %	1940 CBS %	1940 NBC Red %	1940 NBC Blue %	1941 MBS %	1941 CBS %	1941 NBC Red %	1941 NBC Blue %
January	+17.5	− 7.2	+11.3	− 4.9	+ 1.0	+34.7	+13.7	− 2.8	+ 58.9	+ 9.3	+ 7.5	+10.2
February	+ 8.2	− 5.1	+ 9.5	+ 1.3	+22.0	+31.0	+13.0	+ 2.7	+ 30.8	+ 5.2	+ 2.0	+ 9.5
March	+31.8	− 3.6	+11.8	+ 3.8	+27.4	+20.1	+ 4.0	+ 1.0	+ 31.5	+11.2	+11.7	+ 5.6
April	+38.4	+17.7	+ 8.5	+ 4.8	+38.0	+16.4	+12.2	+17.4	+ 24.0	+17.1	+15.7	− 8.6
May	+21.1	+26.8	+ 7.7	+11.0	+37.0	+15.3	+10.0	+ 5.7	+ 54.3	+ 7.1	+ 7.7	+ 2.1
June	+12.9	+34.8	+ 0.9	+24.5	+31.1	+ 9.9	+ 9.7	+ 1.3	+ 78.3	+17.9	+16.8	+ 9.1
July	+29.9	+69.0	+18.1	+22.6	+ 8.3	+32.8	+20.8	+ 1.7	+130.2	+13.9	+10.5	+10.6
August	+24.2	+64.5	+10.5	+21.5	+11.2	+22.8	+16.5	− 0.9	+139.9	+18.7	+ 7.6	+16.1
September	+ 5.5	+60.0	+ 9.2	+19.9	+34.1	+21.3	+17.6	+15.0	+ 78.8	+13.4	+ 9.4	− 1.4
October	+23.0	+41.1	+17.6	− 5.0	+83.4	+18.8	+13.8	+40.1	+ 7.0	− 2.5	+ 2.0	−15.0
November	− 8.4	+41.6	+13.2	− 4.2	+92.9	+ 6.2	+10.2	+13.4	+ 52.7	+ 0.5	+16.3*	+ 3.5*
December	− 5.6	+39.5	+13.5	+ 0.7	+81.4	+ 8.2	+13.9	+17.4	+ 64.3	− 1.3	+16.2*	+ 3.5*
Total	+14.0	+26.3	+10.3	+ 5.6	+43.1	+18.8	+12.8	+ 9.4	+ 53.2	+ 8.7	+10.3	+ 3.0

* November and December 1941 estimated for these networks from published information.

Sources: CBS Research Department Records for CBS; Publishers Information Bureau for MBS and NBC.

PUBLISHERS' INFORMATION BUREAU, INC., 31 East 10th Street, New York, New York

Publishers' Information Bureau (PIB) was founded in 1915 to provide advertising expenditure records for the leading national magazines and farm papers. In 1933, this service also began to publish monthly figures for advertisers' gross expenditures for network time. This organization checks all advertising insertions in 103 magazines, 42 farm papers, and all nationwide network broadcasting. It offers the only service of its kind and is the recognized source for expenditure figures in the fields of national magazines, farm papers and network radio. Forty of the leading advertising agencies subscribe to these reports and make the collection of these data feasible.

[fol. 507] EXHIBIT "B" TO REPLY AFFIDAVIT OF FRANK STANTON

Mutual Broadcasting System

Trend of Gross Sales of Network Time, as shown by

12 Months Sales Ending at Month Indicated

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	—	$1,386	$2,035	$2,293	$2,968	$3,332	$4,955
February	—	1,481	2,105	2,316	2,989	3,393	5,059
March	—	1,579	2,161	2,302	3,063	3,477	5,182
April	—	1,600	2,221	2,291	3,136	3,578	5,269
May	—	1,619	2,246	2,331	3,177	3,666	5,444
June	—	1,633	2,259	2,416	3,202	3,731	5,677
July	—	1,680	2,251	2,481	3,253	3,755	5,983
August	—	1,730	2,225	2,549	3,293	3,778	6,302
September	—	1,816	2,189	2,617	3,303	3,851	6,524
October	—	1,907	2,156	2,726	3,383	4,207	6,579
November	—	1,961	2,187	2,828	3,349	4,508	6,910
December	$1,293	1,979	2,239	2,920	3,330	4,767	7,301

Source: Publishers Information Bureau

EXHIBIT "C" TO REPLY AFFIDAVIT OF FRANK STANTON

Columbia Broadcasting System

Trend of Gross Sales of Network Time, as shown by

12 Months Sales Ending at Month Indicated

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	—	$17,770	$23,646	$29,223	$27,139	$35,442	$41,359
February	—	18,025	24,001	29,639	27,001	36,231	41,531
March	—	18,367	24,388	30,114	26,892	36,818	41,947
April	—	18,703	25,001	29,975	27,322	37,287	42,516
May	—	19,165	25,812	29,856	27,977	37,760	42,770
June	—	19,601	26,786	29,501	28,716	38,044	43,333
July	—	19,983	27,481	28,880	29,660	38,804	43,760
August	—	20,337	28,204	28,349	30,578	39,338	44,300
September	—	21,089	28,394	27,922	31,540	39,884	44,717
October	—	21,913	28,144	27,804	32,519	40,519	44,614
November	—	22,621	28,369	27,603	33,540	40,735	44,633
December	$17,638	23,168	28,722	27,345	34,540	41,026	44,584

Source: CBS Research Department.

[fol. 508] EXHIBIT "D" TO RE Y AFFIDAVIT OF FRANK STANTON

National Broadcasting Co.—Red Network

Trend of Gross Sales of Network Time, as shown by

12 Months Sales Ending at Month Indicated

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	—	$19,402	$23,295	$27,432	$31,485	$34,801	$39,049
February	—	19,386	23,871	27,665	31,772	35,157	39,113
March	—	19,421	24,487	27,870	32,045	35,279	39,485
April	—	19,524	25,029	28,025	32,254	35,605	39,955
May	—	19,497	25,641	28,391	32,456	35,888	40,196
June	—	19,478	26,359	28,732	32,478	36,137	40,670
July	—	19,685	26,765	29,091	32,672	36,672	40,997
August	—	19,974	27,306	29,364	32,920	37,104	41,230
September	—	20,683	27,370	29,704	33,141	37,563	41,518
October	—	21,286	27,175	30,280	33,645	38,018	41,594
November	—	22,035	27,656	30,870	34,014	38,351	42,178*
December	$19,499	22,646	27,172	31,187	34,399	38,800	42,777*

Source: Publishers Information Bureau.

*November and December, 1941, monthly gross sales estimated.

EXHIBIT "E" TO REPLY AFFIDAVIT OF FRANK STANTON

National Broadcasting Co.—Blue Network

Trend of Gross Sales of Network Time, as shown by

12 Months Sales Ending at Month Indicated

(Expressed in Thousands of Dollars)

Month	1935	1936	937	1938	1939	1940	1941
January	—	$11,534	$12,089	$11,471	$10,218	$10,814	$11,971
February	—	11,506	12,094	11,440	10,232	10,842	12,070
March	—	11,483	12,055	11,427	10,273	10,853	12,133
April	—	11,440	12,049	11,305	10,314	11,008	12,043
May	—	11,344	12,091	11,138	10,400	11,058	12,062
June	—	11,305	12,052	10,995	10,559	11,058	12,137
July	—	11,319	11,923	10,888	10,691	11,081	12,236
August	—	11,431	11,745	10,770	10,814	11,074	12,347
September	—	11,446	11,645	10,559	10,929	11,179	12,336
October	—	11,760	11,483	10,417	10,881	11,551	12,141
November	—	11,824	11,515	10,345	10,838	11,682	12,180*
December	$11,650	11,878	11,479	10,275	10,846	11,863	12,223*

Source: Publishers Information Bureau.

*November and December, 1941, monthly gross sales estimated.

[fol. 509] EXHIBIT "F" TO REPLY AFFIDAVIT OF FRANK STANTON

Mutual Broadcasting System

Trend to Gross Sales of Network Time for 12 Months

Ending with Each Month Indicated

Index: 3 Year Average 1936-1938 = 100%

Month	1935	1936	1937	1938	1939	1940	1941
January	—	58.2%	85.5%	96.4%	124.7%	140.0%	208.2%
February	—	62.2	88.5	97.3	125.6	142.6	212.6
March	—	66.4	90.8	96.7	128.7	146.1	217.8
April	—	67.2	93.4	96.3	131.8	150.4	221.4
May	—	68.0	94.4	97.9	133.5	154.0	228.8
June	—	68.6	94.9	101.5	134.6	157.0	238.6
July	—	70.6	94.6	104.3	136.7	157.8	251.4
August	—	72.7	93.5	107.1	138.4	158.8	264.8
September	—	76.3	92.0	110.0	138.8	161.8	274.1
October	—	80.1	90.6	114.6	142.2	176.8	276.5
November	—	82.4	91.9	118.8	140.7	189.4	290.3
December	54.3%	83.2	94.1	122.7	139.9	200.3	306.8

*Average 12 month total of gross sales for years 1936, 1937, 1938 = $2,379,573. The 12 months' total of gross sales ending with each month above, is then expressed as a percent of this average.

EXHIBIT "G" TO REPLY AFFIDAVIT OF FRANK STANTON

Columbia Broadcasting System

Trend of Gross Sales of Network Time for 12 Months

Ending with Each Month Indicated

Index: 3 Year Average 1936-1938 = 00%

Month	1935	1936	1937	1938	1939	1940	1941
January	—	67.3%	89.5%	110.6%	102.8%	134.2%	156.6%
February	—	68.2	90.9	112.2	102.2	137.2	157.2
March	—	69.5	92.3	114.0	101.8	139.4	158.8
April	—	70.8	94.7	113.5	103.4	141.2	161.0
May	—	72.6	97.7	113.0	105.9	143.0	161.9
June	—	74.2	101.4	111.7	108.7	144.0	164.1
July	—	75.7	104.0	109.3	112.3	146.9	165.7
August	—	77.0	106.8	107.3	115.8	148.9	167.7
September	—	79.8	107.5	105.7	119.4	151.0	169.3
October	—	80.9	106.6	105.3	123.1	153.4	168.9
November	—	85.6	107.4	104.5	127.0	154.2	169.0
December	66.8%	87.7	108.7	103.5	130.8	155.3	168.8

Average 12 month total of gross sales for years 1936, 1937, 1938 = $26,411,887. The 12 months' total of gross sales ending with each month above, is then expressed as a percent of this average.

[fol. 510] EXHIBIT "H" TO REPLY AFFIDAVIT OF FRANK STANTON

National Broadcasting Co.—Red Network

Trend of Gross Sales of Network Time for 12 Months Ending with Each Month Indicated

Index: 3 Year Average 1936–1938=100%*

Month	1935	1936	1937	1938	1939	1940	1941
January	—	71.9%	86.3%	101.6%	116.6%	128.9%	144.6%
February	—	71.8	[illegible]	102.5	117.5	130.2	144.9
March	—	71.9	90.7	103.2	118.7	130.7	146.2
April	—	72.3	92.7	103.8	119.5	131.9	148.0
May	—	72.2	95.0	105.1	120.2	132.9	148.9
June	—	72.1	97.6	160.4	120.3	133.8	150.6
July	—	72.9	99.1	107.7	121.0	135.8	151.8
August	—	74.0	101.1	108.7	121.9	137.4	152.7
September	—	76.6	101.4	110.0	122.7	139.1	153.8
October	—	78.8	100.6	112.1	124.6	140.8	154.0
November	—	81.6	100.2	114.3	126.0	142.0	156.2**
December	72.2%	83.9	100.6	115.5	127.4	143.7	158.4**

Average 12 months total of gross sales for years 1936, 1937, 1938=$27,001,566. The 12 months' total of gross sales ending with each month above is then expressed as a percent of this average.

** November and December 1941, based on estimated monthly gross sales for that portion of the 12-month period.

EXHIBIT "I" TO REPLY AFFIDAVIT OF FRANK STANTON

National Broadcasting Co.—Blue Network

Trend of Gross Sales of Network Time for 12 Months Ending with Each Month Indicated

Index: 3 Year Average 1936–1938=100%*

Month	1935	1936	1937	1938	1939	1940	1941
January	—	102.9%	107.8%	102.3%	91.1%	96.5%	106.8%
February	—	102.6	107.9	102.0	91.3	96.7	107.7
March	—	102.4	107.5	101.9	91.6	96.8	108.2
April	—	102.0	107.5	100.8	92.0	98.2	107.4
May	—	101.2	107.8	99.3	92.8	98.6	107.6
June	—	100.8	107.5	98.1	94.2	98.7	108.3
July	—	101.0	106.4	97.1	95.4	98.8	109.1
August	—	102.0	104.8	96.1	96.5	98.8	110.1
September	—	102.1	103.9	94.2	97.5	99.7	110.0
October	—	104.9	102.4	92.9	97.1	103.0	108.3
November	—	105.5	102.7	92.3	96.7	104.2	108.6**
December	103.9%	105.9	102.4	91.7	96.7	105.8	109.0**

* Average 12 month total of gross sales for year 1936, 1937, 1938=$11,211,071. The 12 months' total of gross sales ending with each month above is then expressed as a percent of this average.

** November and December 1941, based on estimated monthly gross sales for that portion of the 12-month period.

[fol. 511] EXHIBIT "J" TO REPLY AFFIDAVIT OF FRANK STANTON

Mutual Broadcasting System

Gross Sales of Network Time, Excluding Cost of Talent
1935–1941

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	$65	$158	$214	$268	$315	$318	$505
February	67	162	232	256	277	338	442
March	94	191	247	233	307	391	514
April	118	140	200	190	263	363	450
May	111	130	155	194	235	322	497
June	91	105	117	202	228	299	533
July	63	110	102	167	217	235	541
August	72	122	97	165	205	228	547
September	83	169	133	200	211	283	506
October	180	272	239	348	428	785	840
November	173	228	258	361	327	628	959
December	175	193	245	337	318	577	948
Total	$1,293	$1,979	$2,239	$2,920	$3,330	$4,767	$7,301

Source: Publishers Information Bureau.

EXHIBIT "K" TO REPLY AFFIDAVIT OF FRANK STANTON

Columbia Broadcasting System

Gross Sales of Network Time, Excluding Cost of Talent
1935–1941

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	$1,769	$1,909	$2,379	$2,880	$2,674	$3,576	$3,910
February	1,654	1,909	2,264	2,680	2,542	3,331	3,503
March	1,830	2,172	2,560	3,034	2,926	3,513	3,929
April	1,615	1,951	2,563	2,424	2,854	3,323	3,891
May	1,287	1,750	2,561	2,442	3,097	3,571	3,825
June	1,067	1,503	2,477	2,121	2,860	3,144	3,707
July	910	1,294	1,988	1,368	2,312	3,071	3,409
August	879	1,233	1,955	1,424	2,342	2,876	3,415
September	1,087	1,839	2,029	1,602	2,563	3,110	3,527
October	1,931	2,755	2,505	2,387	3,367	4,001	3,899
November	1,722	2,430	2,654	2,453	3,474	3,690	3,708
December	1,886	2,433	2,787	2,529	3,529	3,820	3,772
Total	$17,638	$23,168	$28,722	$27,345	$34,540	$41,026	$44,584

Source: CBS Research Department Records.

[fol. 512] EXHIBIT "L" TO REPLY AFFIDAVIT OF FRANK STANTON

National Broadcasting Co.—Red Network

Gross Sales of Network Time, Excluding Cost of Talent
1935–1941

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	$1,822	$1,725	$2,375	$2,635	$2,932	$3,335	$3,584
February	1,714	1,698	2,274	2,507	2,744	3,100	3,164
March	1,879	1,915	2,531	2,736	3,060	3,182	3,554
April	1,660	1,762	2,304	2,458	2,668	2,993	3,463
May	1,677	1,650	2,261	2,628	2,829	3,112	3,353
June	1,509	1,490	2,209	2,550	2,572	2,821	3,295
July	1,406	1,613	2,019	2,377	2,571	3,106	3,433
August	1,265	1,554	2,094	2,368	2,617	3,049	3,282
September	1,285	1,993	2,058	2,397	2,618	3,077	3,366
October	1,815	2,418	2,223	2,799	3,292	3,747	3,822
November	1,659	2,408	2,289	2,878	3,257	3,590	4,174*
December	1,808	2,419	2,535	2,853	3,238	3,687	4,286*
Total	$19,499	$22,646	$27,172	$31,187	$34,399	$38,800	$42,777

Source: Publishers Information Bureau.

* November and December estimated.

EXHIBIT "M" TO REPLY AFFIDAVIT OF FRANK STANTON

National Broadcasting Co.—Blue Network

Gross Sales of Network Time, Excluding Cost of Talent
1935–1941

(Expressed in Thousands of Dollars)

Month	1935	1936	1937	1938	1939	1940	1941
January	$1,073	$957	$1,167	$1,159	$1,102	$1,070	$1,179
February	1,045	1,017	1,022	991	1,004	1,032	1,130
March	1,146	1,123	1,083	1,070	1,111	1,122	1,185
April	1,022	980	974	852	893	1,048	958
May	1,008	912	953	786	873	922	941
June	872	833	794	651	810	821	896
July	803	817	689	581	713	725	824
August	757	869	691	573	696	689	800
September	879	893	793	582	698	802	791
October	964	1,279	1,117	975	927	1,299	1,104
November	996	1,060	1,092	1,021	978	1,109	1,148*
December	1,086	1,140	1,104	1,034	1,042	1,223	1,266*
Total	$11,650	$11,878	$11,479	$10,275	$10,846	$11,863	$12,223

Source: Publishers Information Bureau.

* November and December estimated.

[fol. 513] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

APPEARANCE OF FEDERAL COMMUNICATIONS COMMISSION

In accordance with the provisions of the Act of October 22, 1913 (38 Stat. 219) as extended by Section 402(a) of the Communications Act of 1934, as amended, the Federal Communications Commission hereby enters its appearance as a party defendant, and the appearance of its counsel in the above-entitled matter.

By filing this Appearance the Commission does not concede the jurisdiction of the Court of this case.

Federal Communcations Commission, by Telford Taylor, General Counsel. Thomas E. Harris, Assistant General Counsel.

[fol. 514] AFFIDAVIT OF SERVICE

CITY OF WASHINGTON,
District of Columbia, ss:

TELFORD TAYLOR, being first duly sworn on oath, deposes and says that on this 1st day of November, 1941, he served copies of the foregoing Appearance of Federal Communications Commission by placing same in envelopes, postpaid and duly addressed to each of the following: John J. Burns, attorney for plaintiff, 40 Wall Street, New York, New York, The Honorable Francis Biddle, Attorney General of the United States of America, Department of Justice, Washington, D. C.; and The Honorable Mathias F. Correa, United States Attorney for the Southern District of New York, United States Courthouse, Foley Square, New York, New York, and by depositing same in the United States mail chute at the Benjamin Franklin Post Office, Washington, D. C.

Telford Taylor.

Subscribed to and sworn before me this 1st day of November, 1941. Stephen Tuby Jr., Notary Public. My Commission expires Oct. 14, 1943.

[fol. 515] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

MOTION TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Upon the complaint herein and upon the annexed affidavit of Telford Taylor, verified the 5th day of November, 1941, and exhibit referred to therein and filed therewith, and upon all the other papers and proceedings heretofore filed and had herein, the defendants in the above-entitled cause move this Court to dismiss the complaint or, in the alternative, for summary judgment in their favor.

The grounds of the motions are:

1. The Court lacks jurisdiction of the subject matter of this action under the special statutory provisions referred to in the preamble to the complaint.

2. The complaint fails to state a claim upon which relief can be granted.

3. Even if the Court have jurisdiction of the subject matter of this action, the pleadings and other papers on file and the affidavit submitted on these motions and exhibit referred to therein and filed therewith show that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law.

[fol. 516] Dated: Washington, D. C., November 7th, 1941.

(S.) Samuel Brodsky, Attorney for the United States of America, United States Court House, Foley Square, New York, N. Y. Telford Taylor, Thomas E. Harris, Attorneys for Federal Communications Commission, 7528 New Post Office Building, Washington, D. C.

[fol. 517] IN DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF TELFORD TAYLOR

DISTRICT OF COLUMBIA, ss:

TELFORD TAYLOR, being duly sworn, says:

1. He is General Counsel of the Federal Communications Commission and as such is familiar with the Commission's proceedings taken under Order No. 37, Docket No. 5060, and that the proceedings include the following:

(a) The Federal Communications Commission on March 18, 1938, by Order No. 37, authorized an investigation "to determine what special regulations, applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity." On April 6, 1938, a committee of three Commissioners was appointed by the Commission to supervise the investigation, to hold hearings in connection therewith, and "to make reports to the Commission with recommendations for action by the Commission."

(b) Between November 14, 1938, and May 19, 1939, the committee held hearings pursuant to public notice that the Commission would hear any person or organization desiring to present evidence on the matters included for investigation in Commission Order No. 37. The committee requested the national networks, regional networks, station licensees, and transcription and recording com- [fol. 518] panies to present evidence. It also requested information by questionaire from licensees of stations and from holders of stock in licensee corporations. In addition, persons and organizations requesting an opportunity to present evidence material to the investigation were given an opportunity to be heard. In all, the committee actually heard witnesses on 73 days during this 6-month period. Ninety-six witnesses were heard. Their evidence fills 8,713 pages of transcript. Seven hundred and seven exhibits were introduced. The testimony and exhibits fill 27 large volumes.

(c) Twenty of the ninety-six witnesses were called by the National Broadcasting Co.; they testified for the equivalent of more than 24 hearing days. Their testimony fills 3,225 of the 8,713 pages of transcript. They introduced 227 of the 707 exhibits. The testimony of one National Broadcasting Company witness, David Sarnoff, president of the Radio Corporation of America and chairman of the Board of the National Broadcasting Company, fills 200 pages.

(d) Seventeen witnesses appeared on behalf of Columbia Broadcasting System. They testified for the equivalent of more than 16 hearing days. Their testimony fills 2,180 pages of the transcript and they introduced 186 exhibits. The testimony of the president of the Columbia Broadcasting System fills 130 pages of the transcript.

(e) Eight witnesses for the Mutual Broadcasting System testified for the equivalent of more than 6 hearing days, filling 670 pages of the transcript and introducing 53 exhibits.

(f) On June 12, 1940, the committee issued its report [fol. 519] based upon the evidence adduced at the hearings and the official records of the Commission.

(g) In November, 1940 briefs in the proceeding were filed on behalf of National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System and other interested parties. On December 2 and 3, 1940, oral arguments before the full Commission were presented by the parties. These arguments were directed to the committee report and to certain draft regulations issued for the purpose of giving scope and direction to the oral arguments. On January 2, 1941, supplementary briefs were filed on behalf of National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System in which were discussed the jurisdiction of the Commission with respect to matters covered by the committee report and the draft regulations, and in which attention was given to the actual and feasible limits of competition in the broadcasting field, with particular reference to network broadcasting.

(h) On May 2, 1941, the Commission issued its report setting forth its findings and conclusions in the proceeding, together with an order adopting eight regulations (Regu-

lations 3.101 to 3.108 inclusive) setting forth policies which the Commission would thereafter apply in exercising its licensing functions. Two of the seven Commissioners filed additional views dissenting from the action taken by the Commission. The effective date of the regulations was deferred for 90 days from the date of the order with respect to existing contracts, arrangements, or understandings, or network organization station licenses, and further provision was made for extension of the effective date of Regulation 3.106 in order to permit the orderly disposition of properties. [fol. 520] On June 13, 1941, the Commission provided for the postponement for 90 days from May 2, 1941 of Regulation 3.107, and for further postponement of the effective date of that regulation in order to permit the orderly disposition of properties. On July 22, 1941, the effective date of the regulations with respect to existing contracts, arrangements, or understandings, or network organization station licenses, or the maintenance of more than one network by a single network organization was again deferred until September 16, 1941, and on August 28, 1941, said effective date was postponed until after the disposition of the petition of the Mutual Broadcasting System to amend Regulations 3.103 and 3.104.

(i) On August 14, 1941, the Mutual Broadcasting System petitioned the Commission to amend two of the regulations, 3.103 and 3.104. Upon this petition the Commission called for briefs and oral argument by interested parties. Briefs were filed by National Broadcasting Company, Inc., Columbia Broadcasting System and Mutual Broadcasting System and by one regional network organization and oral argument was held before the Commission on September 12, 1941. Thereafter, on October 11, 1941, the Commission issued a Supplemental Report on Chain Broadcasting (two of the six Commissioners dissenting) together with amendments to three of the regulations (3.102, 3.103, and 3.104). The Commission simultaneously postponed the effective date of the regulations with respect to existing contracts, arrangements, or understandings, or network organization station licenses until November 15, 1941, and suspend the effective date of Regulation 3.107 indefinitely, with the provision that any subsequent order of the Commission placing [fol. 521] Regulation 3.107 in effect should provide for not less than six months' notice and for further extension of its

effective date from time to time in order to permit the orderly disposition of properties.

(j) On October 31, 1941, the Commission issued its minute setting forth the procedure to be followed in applying the Chain Broadcasting Regulations. Said minute reads as follows:

"If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the license thereupon conforms to the decision.

"The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106 relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

"The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations."

2. A certified copy of said proceedings before the Commission in connection with Order No. 37, Docket No. 5060, is filed herewith and incorporated herein by reference as Exhibit A.

[fol. 522] 3. Among the grounds urged by plaintiff in support of its contention that the action of the Commission promulgating the Chain Broadcasting Regulations is invalid are that:

"1. The Rules are unreasonable, arbitrary and destructive of plaintiff's business without legitimate reason.

"2. The Rules are not required by and do not serve the public interest, convenience and necessity.

"3. The Rules are not necessary to carry out the provisions or the purposes of the Communications Act of 1934.

"4. The Rules are in fact contrary to the public interest, convenience and necessity, and to the provisions and purposes of the Communications Act of 1934."

Affiant submits that Exhibit A is relevant on the above issues sought to be raised and that it shows that the regulations are not arbitrary and capricious but that they serve public interest, convenience or necessity and carry out the provisions or purposes of the Communications Act, and that there is no genuine issue as to any material fact.

Telford Taylor.

Subscribed and Sworn before me this 5th day of November, 1941. Pansy E. Wiltshire, Notary Public. Comm. Exp. 10/31/45.

[fol. 523] In District Court of the United States for the Southern District of New York

[Title omitted]

Stipulation and Order Granting Temporary Suspension of Commission's Order

It is hereby stipulated by and between all the parties by their respective counsel:

1. That counsel for all parties will cooperate to bring on for hearing on or before December 15, 1941, the Motion for Preliminary Injunction heretofore filed by plaintiffs and the defendants' Motion to Dismiss the Complaint or, in the alternative, for Summary Judgment.

2. Pending such hearing by this Court and the determination by it of plaintiffs' said Motion for Preliminary Injunction, the defendant Federal Communications Commission is suspending, and will take no steps for enforcement or application of, the Commission's Order of May 2, 1941, in Docket No. 5060, at last amended October 11, 1941, with respect to any failure by any radio station to comply with such Order.

3. Any party hereto may move before the Court to modify the terms of this stipulation to the same extent which such party would be entitled to had this stipulation been [fol. 524] in the form of a temporary restraining order issued after hearing.

United States of America, By Samuel Brodsky, Special Assistant to the Attorney General. Federal Communications Commission, By Telford Taylor, General Counsel. Thomas E. Harris, Assistant General Counsel. Columbia Broadcasting System, Inc., By John J. Burns.

So ordered. 12 November, 1941.

Learned Hand, United States Circuit Judge. Henry W. Goddard, United States District Judge. John Bright, United States District Judge.

[fol. 525] In District Court of the United States for the Southern District of New York

[Title omitted]

Order Granting Leave to Intervene

The Mutual Broadcasting System, Inc. having moved for an order granting it leave to intervene as a party defendant in the above entitled proceeding,

Now, upon reading and filing the notice of motion of Mutual Broadcasting System, Inc., dated December 10, 1941, and the Motion to intervene and the proposed answer of Mutual Broadcasting System, Inc. annexed thereto, and upon all the papers and proceedings herein, and upon the consent of the attorneys for all the parties hereto affixed to the foot of a copy of this order, and upon motion of Leon Lauterstein, attorneys for Mutual Broadcasting System, Inc., it is

Ordered, that said motion be and the same hereby is granted, and it is further

Ordered, that Mutual Broadcasting System, Inc., be and the same hereby is made a party defendant in the above entitled proceeding.

Learned Hand, U. S. Circuit Judge. John Bright, U. S. District Judge. Henry W. Goddard, U. S. District Judge.

Dated, New York, December 29th, 1941.

[fols. 526-527] Consented to:

John J. Burns, Attorney for Columbia Broadcasting System, Inc. Samuel Brodsky, Special Assistant to the Attorney General for the United States of America. Telford Taylor, Thomas E. Harris, Attorneys for Federal Communications Commission. Leon Lauterstein, Emanuel Dannett, Attorneys for Mutual Broadcasting System, Inc.

[fol. 528] In United States District Court, Southern District of New York

Civil 16-178

National Broadcasting Company, Inc., Woodmen of the World Life Insurance Society and Stromberg-Carlson Telephone Manufacturing Company, Plaintiffs,

v.

United States of America and the Federal Communications Commission, Defendants

Mutual Broadcasting System, Inc., Intervener

Civil 16-179

Columbia Broadcasting System, Inc., Plaintiff,

v.

The United States of America, Defendant,

Federal Communications Commission and Mutual Broadcasting System, Inc., Interveners

Before: L. Hand, C. J., Goddard and Bright, D.J.J.

Upon motions before answer by the defendants under Rule 12 (b) (1) to dismiss for lack of jurisdiction the com-

plaints in two actions brought under sec. 402 (a) of Title 47, U. S. Code, to enjoin and set aside certain regulations of the Federal Communications Commission.

John T. Cahill, for National Broadcasting Company. [fol. 529] Charles E. Hughes, Jr., for the Columbia Broadcasting System. Telford Taylor and Thomas E. Harris, for the United States and the Commission. Louis G. Caldwell, for the Mutual Broadcasting System, Inc., Intervener.

OPINION

L. Hand, C.J.: These actions were brought to declare invalid and set aside certain regulations originally promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941; in their final form they appear at the end of this opinion. After the actions were filed the Commission, on October 31, 1941, promulgated a further regulation in the form of a "minute", also appearing at the end of the opinion. Preparatory to the issuance of the regulations the Commission had held hearings at which nearly 9,000 pages of testimony were taken; among others whom it had invited to attend, were the two plaintiff "networks", which accepted and took part by introducing extensive evidence. When the regulations appeared, the "networks" brought the two actions at bar under Sec. 402 (a) of Title 47, U. S. Code, to set them aside as beyond the powers of the Commission and as arbitrary, unreasonable and without basis in the evidence. Upon the complaints so filed and voluminous affidavits they then moved for a preliminary injunction against their enforcement pendente lite. In the action brought by the National Broadcasting Company, two "affiliated stations" have joined as parties plaintiff and the United States and the Commission were originally joined as defendants; in the action brought by the Columbia Broadcasting System it alone is plaintiff and the United States is the only defendant, but the Commission later intervened. A third "network", the Mutual Broadcasting System, intervened as a defendant in both actions. The United States and the Commission have countered the plaintiffs' motions by motions, made before answer, to dismiss the complaints for lack of jurisdiction over the subject-matter under Rule 12 (b) (1), and for summary judgment under Rule 56 (b). The Mutual Broadcasting System has answered and joined in the mo-

tions of the other defendants. All these motions having come on before Judge Goddard, he assembled a court composed of three judges, to whom the hearing was transferred in accordance with the Act of October 22, 1913 (38 St. L. 219).

Since we are deciding that the District Court for the Southern District of New York has no jurisdiction over the subject-matter of the actions either as a court of three Judges or of one, it will not be necessary to consider the merits; nevertheless we must say something about the background of the regulations in order to make our discussion intelligible. The business of broadcasting depends for its support principally, if not altogether, upon advertising. The broadcasting is done by "stations", each "station" selecting programs which it thinks will be popular, either spoken, sung or instrumentally performed in its own studio, or relayed to it by a "network" as will appear. Interjected among these programs, occur those fervid importunities of advertisers, upon the results of which the "station" must depend for its revenue. A single "station" dependent upon its own programs alone would be very expensive to operate, and its income would be small; especially if, as has become customary, it were to add to its advertising [fol. 530] programs what are called "sustaining programs", which are not paid for, but which are thought to give a general popularity to the "station". These circumstances have long since resulted in the creation of "networks" of the kind with which the actions at bar are concerned; that is to say, in a widespread system of contracts of a single company with separate "stations" scattered all over the Union and known as "affiliates". The plaintiffs, National Broadcasting Company and the Columbia Broadcasting System, are two such "networks"; they own and operate broadcasting "stations" of their own, but, although they depend in part upon these as outlets, their principal reliance is upon their "affiliates". They originate a great variety of programs—usually in a studio of one of their owned "stations"—which they transmit by telephone to the "affiliates" for broadcasting. The audience of such a "network" in this way becomes the aggregate of the audiences of its "affiliated stations", and this enables it to charge so much higher prices for advertising than the "affiliates" could charge alone, that both they and the "network" can divide the returns to their common advantage.

There are four such national "networks", two owned by the National Broadcasting Company (one of which we are told it has disposed of since these actions were begun), another by the Columbia Broadcasting System, and the fourth by the Mutual Broadcasting System, which has intervened because it feels itself aggrieved by the practices against which the regulations in suit were directed.

Every broadcasting "station" must have a license and the Federal Communications Commission alone has power to grant, refuse, revoke, renew or modify licenses. The Commission also has "authority to make special regulations applicable to radio stations engaged in chain broadcasting." Sec. 303 (i). By virtue of these powers it assumed to promulgate the regulations now challenged, all of which, it will be observed, are no more than declarations of the conditions upon which the Commission will in the future issue licenses to "stations". The defendants' motions to dismiss the complaints are based upon the theory that these regulations are not "orders" within the meaning of sec. 402 (a), and that therefore this court has no jurisdiction over them; indeed, that they are not "orders" of any sort, but merely announcements of the course which it will pursue in the future, whenever an "affiliated station" applies for a new license or for the renewal of an existing one. To this the "networks" reply that the regulations had an immediate effect; that they not only announced what would be the future practice of the Commission, but presently adjudicated the invalidity of the contracts between themselves and their "affiliates"; and that they have in fact already caused serious losses, because a number of "affiliates" have declared that they will be obliged to break their contracts when their licenses are renewed, and have thus made it impossible for the "networks" to accept large and valuable advertising contracts.

We do not think that we need commit ourselves generally as to what "orders" are reviewable under the Act of October 22, 1913 (38 St. L. 219), which sec. 402 (a) of Title 47, U. S. Code, incorporates by reference as the measure of our jurisdiction. So far as we have found, the Supreme Court has never declared that that statute authorizes review of any decision of an administrative tribunal which neither directs anyone to do anything, nor finally adjudicates a fact to exist upon which some right or duty immediately depends. We agree that it is no answer that the

decision challenged is "legislative" in character, (The Chicago Junction Case, 264 U. S. 258, 263), and, as we have just implied, it is enough if it authoritatively determines the existence of a fact that at once sets in execution some sanction, though the decision itself be not in form a command. United States v. Baltimore & Ohio Railroad, 293 [fol. 531] U. S. 454; Powell v. United States, 300 U. S. 276; Rochester Telephone Corporation v. United States, 307 U. S. 125; American Federation of Labor v. National Labor Relations Board, 308 U. S. 401, 408. (Colorado v. United States, 271 U. S. 153; Claiborne-Annapolis Ferry Co. v. United States, 285 U. S. 382; and United States v. Idaho, 298 U. S. 105, though they are of the same kind, are scarcely controlling because they turned upon sec. 1 (20) of the Interstate Commerce Act.) But decisions which are no more than announcements of future administrative action have never, so far as we can find, been treated as within this statute. That does not necessarily imply that a person presently injured is without any remedy when the threatened action would be unlawful; the situation then may present all the elements upon which equity will intervene in ordinary course. Shields v. Utah Idaho Central Railroad Company, 305 U. S. 177. It may be that the plaintiffs at bar could bring such actions in equity; at least it does not appear that recourse to them is positively forbidden, as was for example the case in Venner v. Michigan Central, 271 U. S. 127. But even so they would not be the actions at bar, which can be brought only under the statute, since otherwise the United States cannot be sued, or the Commission sued in this district, assuming that it was in any event possible to join it at all. Such actions would have to depend jurisdictionally upon the same facts as any other action against a public officer who threatens to do an unlawful act.

We should therefore have a great deal of doubt whether the regulations could in any view be regarded as "orders" which we could review under the Act of October 22, 1913 (38 St. L. 219), if the case came to us under the statute in vacuo. It does not, because, although, as we have said, sec. 402 (a) incorporates it by reference, those orders are excepted which are mentioned in the parenthesis; to wit, all orders "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for

modification of an existing radio station license." Relief from such orders is provided in sec. 402 (b); (c), (d), (e), and (f); it is by appeal to the Court of Appeals of the District of Columbia, and it is to be heard upon the record made at the hearing of an application by the Commission. The procedure upon such appeals is in substance the same as that which has now become standard for the review of the decisions of administrative tribunals in adversary proceedings. Consequently, if any of the "affiliates" of the plaintiff "networks" should hereafter apply for a renewal of their licenses; and if, as we assume it will, the Commission adheres to its regulations, the resulting modification of the license will be reviewable only in the Court of Appeals of the District and upon the record made at that hearing. We have seen, however, that the regulations are nothing more than a declaration—or if one chooses, a threat—by the Commission that it will impose those conditions upon any renewal of a license in the future. No change is made in the status of "affiliates" meanwhile; their existing contracts with the "network" remain enforceable; nor has the Commission given any evidence of an intention to use them as the basis for a revocation of existing licenses under sec. 312 (a). On the contrary, the "minute" we have mentioned commits it to a contrary course. Hence, if these actions well lie, the plaintiffs have succeeded in substituting a different court and a different procedure from that which Congress has prescribed for the trial of precisely the same issues. This is inexorably true because here the only question is whether the Commission has power to impose the conditions mentioned in the regulations when a "station". [fol. 532] applies for renewal; exactly the question which will determine the actual renewal of a license. The prescribed procedure will therefore be disregarded only because the putative wrong is merely threatened, instead of being in the very act of commission. Whatever may ordinarily be the proper scope of the word "order" in the Act of October 22, 1913 (38 St. L. 219), it seems to us clear that Congress could not have intended such an anomalous result as will follow upon treating these particular regulations as such "orders".

To this the plaintiffs make two answers. First, they say that the threat itself has already caused them loss, as we have said. Possibly that might support an action to compel

the Commission to raise the issues immediately, as by a revocation proceeding under sec. 312 (a); even so, it should not substitute another court for the Commission and the Court of Appeals, certainly not this court in an action against the United States and the Commission. We need not decide the point, however, because the "minute" we have quoted offers equivalent relief without risk to any "station" which may challenge the regulations. Next, the plaintiffs say that they may not be able to raise the issue in a proceeding for the renewal of a license, because the "affiliated stations" may fear to incur the Commission's displeasure. As to the National Broadcasting Company this is plainly untrue because two of its "affiliates" have joined it as plaintiffs. As to the Columbia Broadcasting System, its complaint, read most favorably, does perhaps allege that none of its "affiliates" will challenge the regulations when their licenses expire; at any rate, to avoid any doubts, we shall so assume, little as that seems likely to be the case. We may do so, because the issue is irrelevant anyway, for the plaintiff "networks" have an adequate remedy under sec. 402 itself. They allege—and there seems to be no question about it—that their interest will be adversely affected by the enforcement of the regulations; if so, they can appeal to the Court of Appeals of the District from any order imposing unlawful conditions upon an "affiliate's" license. Sec. 402 (b) (2). It is true that the section does not in terms provide that they shall also be heard in the proceeding before the Commission under sec. 309 (a) for the "renewal or modification of a station license;" but the Commission has itself answered that objection by sec. 1.102 of its regulations which permits intervention. An unreasonable refusal of the privilege so offered would appear to be a good objection on appeal under sec. 402 (b) (2); for it is not likely that the statute which grants an appeal to all interested parties, meant not to give them the opportunity to make a record on which they can succeed upon that appeal. At any rate until the Commission shows some disposition to deny them a fair hearing in a proceeding for renewal of an "affiliate's" license, we are not to assume that it will do so. And even if that should appear, the resulting right of action, if any, would not, as we have said, be in this court or against the United States. For the foregoing reasons the complaints will be dismissed for lack of jurisdiction over the subject-matter.

We do not understand that any findings of fact are proper under Rule 52 (a), which provides for such findings only in "actions tried upon the facts without a jury." It is true that the plaintiffs have moved for a preliminary injunction, and that the rule also requires findings "in granting or refusing interlocutory injunctions;" but we are not "refusing" any injunction. Once the complaints are dismissed for lack of jurisdiction, the motions become moot and we shall not pass upon them at all. We are therefore entering judgment in each action without findings.

[fol. 533] Complaints dismissed for lack of jurisdiction.

(S.) Learned Hand, Henry W. Goddard.

[fol. 534] The Chain Broadcasting Regulations

Sec. 3.101. *Exclusive affiliation of station.* No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for broadcasting the programs of any other network organization.

Sec. 3.102. *Territorial exclusivity.* No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

Sec. 3.103. *Term of affiliation.* No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided,* That a contract arrangement,

or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

[fol. 535] Sec. 3.104. *Option time.* No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a. m. to 1:00 p. m.; 1:00 p. m. to 6 p. m.; 6:00 p. m. to 11:00 p. m.; 11:00 p. m. to 8:00 a. m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

Sec. 3.105. *Right to reject programs.* No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

Sec. 3.106. *Network ownership of stations.* No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality [fol. 536] where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.

Sec. 3.107. *Dual network operation.* No license shall be issued to a standard broadcast station affiliated with a net-

work organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

Sec. 3.108. *Control by networks of station rates.* No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

[fol. 537] The Minute of October 31, 1941

Procedure in Docket No. 5060.

The Commission today adopted the following minute setting forth the procedure that it will follow in applying the policies announced in the Chain Broadcasting Regulations:

If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee; otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.

The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106, relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will

postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations.

[fol. 538] DISSENTING OPINION

Bright, D. J.:

As I read the opinion of my brothers, they would dismiss for want of jurisdiction because nothing reviewable has been done, and that even after a license is denied, the only review thereof would be by appeal to the Court of Appeals in the District of Columbia.

By Section 402-a of the Communications Act of 1934, we have jurisdiction to enjoin, set aside, annul or suspend an order of the Commission, except where it grants or refuses an application for a construction permit, for the granting, renewal or modification of a station license, or suspending a radio operator's license. These excepted matters can be reviewed only by appeal to the Court of Appeals aforesaid. This order, in my opinion, does not come within any of the excepted provisions. No application has been or is here made for any such relief, and the order sought to be reviewed does not arise out of any such application.

There is no question in my mind that the order sought to be reviewed is one which, under the terms of Section 402-a, we have jurisdiction to enjoin. It is designated by the defendants as a "commission order". It has the usual mandatory clauses found in orders. It was by its terms obviously entered after an investigation made upon the Commission's own motion to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity. It promulgates certain regulations, an obvious and attempted exercise of the Commission's rule-making power. It is clearly an attempt to make rules because at the time there was nothing else before the Commission upon which it could or did act. All of these rules, or regulations as they are called in the order, relate only to standard broadcasting stations having contracts with a

net work organization, except rule 3.106, which relates to a license to be granted to a network organization having more than one station in a service area, and rule 3.107 which proscribes a broadcasting station affiliated with a network maintaining more than one net work. These rules do not apply to stations not affiliated with any net work. They apply only to contractual relations with net works, and in addition, prohibit the ownership by a net work of more than one station in a specified service area and the ownership by any organization of more than one net work. The order fixes as immediately the time when it shall become effective. In other respects it has all the earmarks of a final order.

That it was intended to be final is further evidenced by the Commission's report. It finds that the public interest "requires" the application of the regulations to stations affiliated with regional as well as with national net works. It affirms its powers to do so under Section 303-(i) of the Communications Act, and clearly reveals that it is exercising its rule-making power when it queries whether the Commission can formulate into "general rules and regulations" the principles which it *intends* to apply in passing on individual applications. That its action is final is further emphasized by the statement, "We believe that the announcement of the principles *we intend to apply* in exercising our licensing power will expedite business and further the ends of justice. * * * The regulations we are now adopting are nothing more than the expression of the general policy *we will apply* in exercising our licensing power. The formulation of a regulation in general terms is an important aid to *consistency and predictability* and does not prejudice any rights of the applicant."

[fol. 539] That it is exercising this rule-making power is further emphasized by another statement in its report, that Section 303-(i) gives the Commission specific power to make special regulations applying to radio stations engaged in chain broadcasting and that "no language could more clearly cover *what we are doing here.*"

What it has done emphasizes more the finality of its order, which is an affirmative direction that thereafter no standard broadcasting station shall contract in terms prohibited, and ultimately puts an end to service by net works under contracts now existing. In fact, I think that the regulations are intended to effect existing contracts for the

effective date of the order is deferred until November 15th, 1941, "with respect to existing contracts, arrangements or understandings". This certainly is not a statement that the regulations shall not apply to existing contracts; it is merely a postponement as to when the axe will fall.

The particular agreements prohibited are presently contained in most of the affiliation contracts of the two complaining net works. They state those provisions are essential to the proper and successful conduct of their business, and in deciding the question of jurisdiction, I believe we must assume this to be true. It is also shown by them, without contradiction, that between the time the regulations were promulgated and the commencement of these actions, not less than twenty-four broadcasting stations having affiliation contracts with N.B.C. have cancelled their contracts as a result of the order in question, and not less than twenty-four others having such contracts, have served notice that they do not intend to abide by the terms of such contracts unless they are conformed to the Commission's order. Similarly, it is shown by the affidavits submitted by C.B.S. that some of the stations affiliated with it are refusing to renew their affiliation contracts, some are threatening to cancel or repudiate them, and some have already cancelled on the ground that the rules in question prohibit them. There is thus a present injury.

It is suggested that the plaintiffs must wait until the Commission has ruled upon the application of a broadcasting station for a renewal of its license. Can it be said that the Commission will change its rules, in view of the positive statement it has already made with reference thereto and above quoted? Must these net works await the idle ceremony of a denial of a license before any relief can be sought when it is perfectly obvious that no relief will be given? And what relief could they get if they did wait? The networks are not to be licensed, only the individual stations who make application. But it is said the net works could intervene and be heard. All that might be said or urged in their behalf has doubtless been communicated to the Commission in the three years between March 18, 1938, and May 2, 1941, when the investigation was going on. Must they march up the hill and down again, with the probability of being met with the statement that the Commission has given the matter due consideration and has done what it intends to abide by, as it has definitely said in its report? It is

said, however, that by a minute adopted after these actions were brought, the Commission has manifested its intention to permit the net works to intervene and be heard upon the subject of the granting or denial of the license. That minute refers obviously only to a station, and insofar as it attempts to change the nature of the order sought to be reviewed or to obviate a review would be abortive. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433-452. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498-515.

[fol. 540] This court has reviewed the rule-making power of this very Commission without being troubled by the question of jurisdiction. *A. T. & T. Co. v. U. S.*, 14 F. Supp. 121, affirmed 299 U. S. 232. That there can be a review of an order exercising the delegated legislative function of rate-making and rule-making is admitted in *U. S.* v. *Los Angeles R. R.*, 273 U. S. 299, 309. *In Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, where bills were filed to enjoin orders prescribing methods of account, bookkeeping and reports, jurisdiction was not questioned in a court always jealous of its jurisdiction. In *Kansas City Southern Railway* v. *U. S.*, 231 U. S. 423, jurisdiction was again assumed of a petition to declare invalid and to enjoin regulations relative to accounting. In *Skinner & Eddy Corp.* v. *U. S.*, 249 U. S., 557-562, which involved a refusal of a suspension of a tariff, jurisdiction was assailed, at least until after a further remedy was sought; and it was there stated that where contention was made that the Commission had exceeded its statutory powers, courts have jurisdiction of suits to enjoin even if the plaintiff had not attempted to secure redress before the Commission. In the *Assigned Car Cases*, 274 U. S. 564, suits were brought to enjoin and annul an order which prescribed a rule governing the distribution of cars among coal mines after an investigation by the Interstate Commerce Commission of its own motion, and no question of right of review was raised. And in *A. F. of L.* v. *Labor Board*, 308 U. S. 401, 408, it was admitted that administrative determinations which are not commands may for all practical purposes, determine rights as effectively as the judgment of a court and may be re-examined by courts under particular statutes providing for the review of orders. In *Pierce* v. *Society of Sisters*, 268 U. S. 510, suit was brought by a private school to restrain the enforcement of an Oregon statute

which required primary education in public schools, and jurisdiction was sustained, Mr. Justice McReynolds writing that the suits were not premature, that the injury to the plaintiffs was present and very real and not a mere possibility in the remote future.

(S.) John Bright, U. S. D. J.

Dated: February 20, 1942.

[fol. 541] In United States District Court, Southern District of New York

Civil 16-179

Columbia Broadcasting System, Inc., Plaintiff

v.

The United States of America, Defendant,

Federal Communications Commission and Mutual Broadcasting System, Inc., Interveners

Order Dismissing Complaint

Before: L. Hand, C. J. and Goddard and Bright, D. JJ.

This cause came on to be heard at the January 1942 term of this court and was argued by counsel; and thereupon, and upon consideration thereof, it is

Ordered, Adjudged and Decreed that the complaint herein, be, and the same hereby is, dismissed because the court has no jurisdiction over the subject-matter of the action.

(Signed) Learned Hand, Circuit Judge. Henry W. Goddard, District Judge. ——— ———, District Judge.

[fol. 542] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR A DIRECT APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To The Hon. Learned Hand, Circuit Judge for the Second Circuit; The Hon. Henry W. Goddard, District Judge for the Southern District of New York; The Hon. John Bright, District Judge for the said District:

Now comes Columbia Broadcasting System, Inc., plaintiff herein, and feeling itself aggrieved by the final order or decree of the District Court rendered and entered in the above entitled cause on the 21st day of February, 1942, does hereby appeal therefrom to the Supreme Court of the United States because of errors prejudicial to plaintiff which are set forth in the assignment of errors presented and filed herewith, and prays that its appeal be allowed and that citation be issued as provided by law and that the record on appeal be made and certified and sent to the Supreme Court of the United States, in accordance with the rules of that Court.

And your petitioner further prays that an order be made fixing the amount of security which your petitioner shall give and furnish upon such appeal.

John J. Burns, Attorney for Columbia Broadcasting System, Inc.

[fol. 543] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL

To The Honorable John J. Bennett, Jr., Attorney General of the State of New York; Samuel Brodsky, Esq., Special Assistant to the Attorney General, Attorney for the United States; Telford Taylor, Esq., General Counsel for the Federal Communications Commission, and Leon Lauterstein, Esq., Attorney for Mutual Broadcasting System, Inc.:

Pursuant to the Urgent Deficiencies Appropriation Act of October 22, 1913, Chap. 32, 38 Stat. 219, 220, you are

hereby notified that Columbia Broadcasting System, Inc., the above named plaintiff, has taken an appeal to the Supreme Court of the United States from the final decree of the specially constituted United States District Court entered herein February 21, 1942, dismissing the complaint of said plaintiff praying that a certain order of the Federal Communications Commission designated "Commission Order in Docket No. 5060, In the Matter of the Investigation of Chain Broadcasting", promulgating certain regulations relating to radio stations and network organiza-
[fol. 544] tions engaged in chain broadcasting, entered May 2, 1941, and amended October 11, 1941, be enjoined, set aside and annulled; and the order allowing the said appeal makes the same returnable in the Supreme Court of the United States forty (40) days from the date hereof.

Dated at New York, N. Y., this 3rd day of March, 1942.

John J. Burns, Attorney for Plaintiff.

[fol. 545] In United States District Court, Southern District of New York

[Title omitted]

Assignment of Errors

Comes now Columbia Broadcasting System, Inc., plaintiff in the above-entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal to the Supreme Court of the United States herein petitioned for in said cause from the decree of the statutory three-judge District Court of the United States for the Southern District of New York entered on the 21st day of February, 1942:

1. The Court erred in dismissing plaintiff's complaint upon the ground that the Court had no jurisdiction over the subject-matter of the cause.

2. The Court erred in failing to find, as it should have done, that it had jurisdiction to issue the injunction prayed for herein.

3. The Court erred in failing to consider on the merits plaintiff's application for a preliminary injunction and in failing to grant such application.

Wherefore, Petitioner prays that the final order or decree entered herein on the 21st day of February, 1942 [fols. 546-547] be reversed and for such other and further relief as to the Court may seem just and proper.

John J. Burns, Attorney for Columbia Broadcasting System, Inc.

[fol. 548] In United States District Court, Southern District of New York

[Title omitted]

Motion for Temporary Restraining Order

Upon the complaint and all the affidavits and other papers filed, and all the proceedings heretofore had, herein, the plaintiff moves this Court for an order suspending and restraining the operation, enforcement or execution of the order of the Federal Communications Commission in Docket No. 5060 made May 2, 1941, as amended October 11, 1941, pending the hearing and determination of an appeal to be taken by the plaintiff to the Supreme Court of the United States from the order or decree of this Court entered February 21, 1942, dismissing the complaint herein on the ground that this Court has no jurisdiction over the subject matter of this action; and for such other and further relief as to the Court may seem just.

John J. Burns, Attorney for Plaintiff, 40 Wall Street, New York City.

Notice of Motion

To:

Samuel Brodsky, Esq., Special Assistant to the Attorney General, Attorney for the United States of America, United States Court House, Foley Square, New York City.

[fol. 549] Telford Taylor, Esq., General Counsel, Federal Communications Commission, Washington, D. C.

Leon Lauterstein, Esq., Attorney for Mutual Broadcasting System, Inc., 15 William Street, New York City.

Please take notice that the undersigned will bring the above motion on for hearing before this Court at Room

No. 110, United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 27th day of February, 1942 at 3 o'clock in the afternoon of that day or as soon thereafter as counsel can be heard.

John J. Burns, Attorney for Plaintiff, 40 Wall Street, New York City.

[fol. 549-a] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF WILLIAM S. PALEY

UNITED STATES OF AMERICA,
Southern District of New York,
City, County and State of New York, ss:

WILLIAM S. PALEY, being duly sworn, deposes and says:

I am the President of Columbia Broadcasting System, Inc. (hereinafter sometimes called "CBS" or "Columbia") and I have been its President since September 26, 1928.

On February 21, 1942 this Court, by a majority thereof, rendered an opinion and entered a final order or decree dismissing the complaint herein upon the ground that the Court has no jurisdiction over the subject matter of this action. Plaintiff intends promptly to appeal to the Supreme Court of the United States from said order or decree and to prosecute such appeal with all due diligence. This affidavit is made in support of an application for an order to preserve the *status quo* pending the hearing and determination of such appeal.

On November 12, 1941 this Court entered an order, upon the stipulation of the attorneys for all the parties hereto, providing, among other things, that pending the hearing by this Court of motion for preliminary injunction thereto-
[fol. 550] fore filed by plaintiff and defendants' motion to dismiss the complaint, or in the alternative for summary judgment, and the determination by this Court of plaintiff's said motion for preliminary injunction, the defendant Federal Communications Commission was suspending and would take no steps for enforcement or application of the Commission's order of May 2, 1941, in docket No. 5060,

as last amended October 11, 1941, with respect to any failure by any radio station to comply with such order. Said order and stipulation further provided that any party hereto might move before this Court to modify the terms of said stipulation to the same extent which such party would be entitled to had this stipulation been in the form of a temporary restraining order issued after hearing. A letter dated November 10, 1941 signed by counsel for the Government and the Federal Communications Commission and addressed to the attorney for Columbia, copy of which is hereto annexed marked Exhibit A, stated the understanding of the parties with respect to matters not covered in the above mentioned stipulation and provided that in the event that the Court denies plaintiff's motion for a preliminary injunction, the Commission will take no steps to enforce or apply its said order for a period of not less than ten days after service of an order of the Court with notice of entry so disposing of plaintiff's motion. I submit that the suspension of the operation of the Commission's said order provided by said stipulation and said letter should be continued pending the hearing and determination of the plaintiff's said appeal by the Supreme Court of the United States.

It is unnecessary to repeat in this affidavit the reasons [fol. 551] why irreparable damage will be suffered by Columbia unless the *status quo* is preserved during the pendency of its appeal, because they are stated in affidavits now before this Court herein, to which I respectfully make reference, to wit: My affidavit verified October 30, 1941 (pp. 34-37), affidavit of Herbert V. Akerberg verified October 29, 1941, and the exhibits thereto, affidavit of Herbert V. Akerberg verified January 5, 1942 (pp. 4-6) and the exhibits thereto (included in volume of "Plaintiff's Additional Affidavits," pp. 34-42). They show that the effect of the Commission's order, if not suspended, is to cause Columbia affiliates to cancel and repudiate, or attempt to cancel and repudiate, their existing affiliation contracts, to cause such affiliates to refuse to renew such contracts and to make it practically impossible for Columbia to make contracts of the kind now in use with prospective new affiliates; and further that Columbia's negotiations with advertisers and prospective advertisers would be greatly complicated because of its inability to assure them of the time of its affiliated stations.

Columbia's standard form of affiliation contract contains the following provision (Exhibit A annexed to Complaint, pp. 4-5):

"9. The obligations under this agreement are subject to all applicable laws, rules and regulations, present and future, especially including rules and regulations of the Federal Communications Commission."

Many of Columbia's affiliated stations have already taken the position, either expressly or by implication, in letters written to Columbia, copies of which are annexed to the [fol. 552] affidavit of Herbert V. Akerberg verified October 29, 1941, Exhibits A to T inclusive, and his affidavit verified January 5, 1942, Exhibits D to H inclusive, that all provisions of the existing affiliation contract inconsistent with the Commission's said regulations are automatically abrogated and the affiliation contract must be considered to have been amended accordingly, if not totally cancelled. Columbia has been able to avoid meeting the issue presented by these letters because of the suspension of the Commission's regulations accomplished by the above mentioned stipulation of the parties and the order entered therein by this Court on November 12, 1941. If the suspension provided thereby be not continued I regard it as certain that Columbia's affiliated stations generally will take the position above indicated and either insist upon a modification of their contracts to conform to the Commission's regulations or treat the contracts as so amended and govern their conduct accordingly.

The licenses of twenty-eight of Columbia's affiliated stations will expire on April 1, 1942 and nineteen on June 1, 1942 (affidavit of Kenneth L. Yourd, verified January 5, 1942, included in volume of "Plaintiff's Additional Affidavits," pp. 1-4). Under the rules of the Commission, stations are required to file their applications for renewal of licenses sixty days in advance of the expiration of their existing licenses. I know of no station which is prepared to contest the application of the Commission's rules. Even if some of the stations should contest. Columbia could not protect its position if even a few stations located in major markets failed to contest, as a disregard by these stations [fol. 553] of their present contractual obligations would effectively disrupt Columbia's network. Unless a station is prepared to contest, it will probably file with the Commis-

sion the letter which it will have written to Columbia stating that it regards its affiliation contract as amended to conform to such regulations. In those circumstances, Columbia can have no assurance that the Commission would treat the application for renewal as if the existing affiliation contract remained in force unamended in accordance with its original terms. If the Commission simply granted the renewal of the station's license there might be no hearing at all before the Commission and Columbia would have no assurance that it could present either to the Commission or to the Court of Appeal of the District of Columbia on review any question of the imposing by the Commission of an unlawful condition. The Commission might very probably take the position that it would not pass on the legal effect of the station's letter purporting to modify the affiliation contract to conform with the regulations, but would treat it as at least a statement on the part of the station that it would govern its conduct on the assumption that its contract was so amended, and leave it to Columbia to litigate its legal rights, if any, with the station. This would at best involve Columbia in a multiplicity of suits the practical results of which, regardless of legal rights, would be highly dubious.

The Commission's minute of October 31 ,1941 purports only to protect the position of a station which "wishes to contest the validity" of the regulations. It is not designed to protect the rights of Columbia and actually could not protect them in the absence of a test by the station.

[fol. 554] Refusal by the affiliated stations to abide by the terms of the existing affiliation contracts pending Columbia's appeal to the Supreme Court of the United States, would leave Columbia irreparably damaged even if it succeeds upon said appeal. A disregard, for example, of the option time provisions of the affiliation contract by even a small number of stations, if they served major markets, would destroy Columbia's ability to assure advertisers of outlets desired by them. I refer the Court to Columbia's main brief (Statement, pp. 8-25) for further indication of the disruption of Columbia's integrity as a network, which would be the consequence of disregard by its affiliated stations of their obligations under their existing contracts. Columbia cannot be protected from rapid disintegration of its business and property interest except by the suspension

of the operation and enforcement of the Commission's said order.

Wherefore Columbia prays that this Court enter an order granting the relief set forth in the accompanying motion.

William S. Paley.

Sworn to before me this 25th day of February, 1942.
James D. McCauley.

[fol. 555] EXHIBIT A

Department of Justice
United States Attorney
Southern District of New York
New York, N. Y.

November 10, 1941.

SB:B.
87361
M 3-351

John J. Burns, Esq,
40 Wall Street
New York, N. Y.

Re: Columbia Broadcasting System, Inc. v. United States, et al. Civil Action No. 16-179

SIR:

In connection with the filing in the three judge District Court for the Southern District of New York of the stipulation between the parties in the above proceeding, providing for suspension of the Commission's Order in Docket No. 5060, as amended, we wish to express the understanding of the parties with respect to matters not covered in said stipulation.

In the event that the Court in said proceeding denies plaintiff's motion for a preliminary injunction, defendant Federal Communications Commission will take no steps to enforce or apply its said Order for a period of not less than

ten days after service of an order of the Court with notice of entry so disposing of plaintiff's motion. It is further understood in this connection, that defendants will be free to oppose and contest any application by plaintiff for a further stay of said Order of the Commission.

It is the further understanding and agreement of the parties to said proceeding that the aforesaid stipulation does not prevent the defendant Federal Communications Commission from continuing in accordance with its past practice to require licensees to advise said Commission from time to time of the terms or status of their network affiliation contracts in order that said Commission may be fully informed thereupon.

If the foregoing statement conforms to your understanding, kindly sign the enclosed copy of this letter and return the same to the Commission.

Very truly yours, Samuel Brodsky, Special Assistant to the Attorney General, Attorney for United [fols. 556-557] States of America. Telford Taylor, General Counsel, Federal Communications Commission. Thomas E. Harris, Assistant General Counsel, Federal Communications Commission.

The foregoing sets forth our understanding.

John J. Burns, Attorney for Columbia Broadcasting System, Inc.

[fol. 558] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 16-178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, Defendants

MUTUAL BROADCASTING SYSTEM, INC., Intervener

Civil Action No. 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant,

THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., Interveners

Before L. Hand, C. J.; Goddard and Bright, D. JJ.

OPINION

PER CURIAM:

The Commission is of course right in saying that we have decided that the plaintiffs have adequate protection outside of these actions and in spite of their dismissal; nevertheless, in deciding whether a stay should be granted pending an appeal, we must assume that we may be mistaken, certainly a not unreasonable assumption in view of Judge Bright's dissent. If so, the plaintiffs will not be adequately pro- [fol. 559] tected, and indeed they may not be anyway if the Commission does not withhold enforcement in all cases until the issues could be once and for all determined in a renewal proceeding. Considering on the one hand that if the regulations are enforced the networks will be obliged to revise their whole plan of operations to their great disadvantage, and on the other that the Commission itself gave no evidence before these actions were commenced that the proposed changes were of such immediately pressing im-

portance that a further delay of two months will be a serious injury to the public, it seems to us that we should use our discretion in the plaintiffs' favor to stay enforcement of the regulations until they can argue their appeal. For these reasons we will grant such a stay until the argument of the appeal before the Supreme Court or the first day of May, 1942, whichever comes first. For any further stay the plaintiffs must apply to the Supreme Court itself, or to the Circuit Justice.

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

[fol. 560] In United States District Court, Southern District of New York

[Title omitted]

Findings of Fact

I. That if the Federal Communications Commission, pending the plaintiff's appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; and if this court —contrary to its said judgment—has in fact jurisdiction over the cause of action stated in the complaint; the plaintiff will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two months or until the appeal can be argued, whichever is earlier, will not, so far as can be ascertained, involve injury to [fol. 561] the public commensurate with the injury to the plaintiff arising from enforcement, if the conditions mentioned in the First Finding exist.

CONCLUSION OF LAW

That the plaintiff is entitled to a stay pending its appeal to the Supreme Court; said stay being an order forbidding the Federal Communications Commission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of May, 1942, whichever is earlier.

Learned Hand, U. S. C. J. Henry W. Goddard, U. S. D. J. John Bright, U. S. D. J.

[fol. 562] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

DECREE GRANTING TEMPORARY RESTRAINING ORDER

This cause came on to be further heard at the February, 1942, term of this court and was argued by counsel and thereupon, upon consideration thereof, it appearing that the relief herein granted is necessary to preserve the status quo pending an appeal by the plaintiff to the Supreme Court, for the reasons appearing in the Opinion, and Findings of Fact and Conclusion of Law filed herewith, it is

Ordered, Adjudged and Decreed that until May 1st, 1942, or the argument of the appeal herein the Supreme Court of the United States, whichever is earlier, the Federal Communications Commission be and the same hereby is restrained from enforcing those regulations which were issued in their amended form on October 11, 1942, and which are known as "Order in Docket No. 5060."

Learned Hand, U. S. C. J.; Henry W. Goddard, U. S. D. J.; John Bright, U. S. D. J.

[fol. 563] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant,

THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., Interveners

ORDER ALLOWING APPEAL

The plaintiff herein having filed a petition for appeal to the Supreme Court of the United States from the decree entered herein on February 21, 1942, and having filed their assignment of errors, it is

Ordered, that an appeal by petitioner in the above-entitled cause to the Supreme Court of the United States from the decree heretofore filed and entered herein on February 21, 1942, be and the same is hereby allowed and that the record on appeal be made and certified and sent to the Supreme Court of the United States in accordance with the rules of that Court, said appeal being hereby made returnable forty (40) days from the date hereof;

Ordered Further, that the bond on appeal, to be approved by this Court, is fixed at the sum of $750.

Learned Hand, U. S. C. J.; Henry W. Goddard, U. S. D. J.; John Bright, U. S. D. J.

[fol. 564] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

CITATION

UNITED STATES OF AMERICA, ss:

To United States of America, Federal Communications Commission, Mutual Broadcasting System, Inc., Appellees, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washing-

ton, D. C. within forty (40) days from the date hereof, pursuant to an order allowing an appeal from the decree of the statutory District Court of the United States for the Southern District of New York in an action in which Columbia Broadcasting System, Inc. is the appellant, and United States of America, Federal Communications Commission and Mutual Broadcasting System, Inc., are appellees, to show cause, if any there be, why the said decree rendered against the said appellant should not be corrected.

Witness, The Honorable Learned Hand, Circuit Judge [fols. 565-570] for the Second Circuit; The Honorable Henry W. Goddard, District Judge for the Southern District of New York; The Honorable John Bright, District Judge for the said District, this 27 day of February, in the year of our Lord one thousand nine hundred and forty-two.

Learned Hand, U. S. C. J.; Henry W. Goddard, U. S. D. J.; John Bright, U. S. D. J.

[fol. 571] In United States District Court, Southern District of New York

[Title omitted]

Direction Re Transmission of Original Documents

It is Hereby Directed that the original of Exhibit A to the affidavit of Telford Taylor, of November 5, 1941, be [fol. 572] transmitted to the Supreme Court.

Learned Hand, U. S. C. J.; Henry W. Goddard, U. S. D. J.; John Bright, U. S. D. J.

Agreed to: John T. Cahill, Solicitor for National Broadcasting Company, Inc. David M. Wood, Solicitor for Woodmen of the World. Thomas H. Middleton, Solicitor for Stromberg-Carlson. Charles Fahy, Solicitor General, by C. R. Denny. Charles Denny, Ass't. Gen'l. Counsel F. C. C. Leon Lauterstein, Attorney for Mutual Broadcasting System, Inc. John J. Burns, Attorney for Columbia Broadcasting System, Inc.

[fol. 573] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the United States District Court for the Southern District of New York:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above-entitled cause and to include in such transcript of record the following, and no other papers and exhibits, to wit:

1. Summons and complaint, together with Exhibits A to F, inclusive, thereto attached;

2. Order dated January 27, 1942, amending complaint; including FCC Report on Chain Broadcasting May, 1941, as part of Exhibit B to the complaint;

3. Plaintiff's notice and motion for a preliminary injunction, and affidavits of William S. Paley, with Exhibits A and B thereto attached, and Herbert V. Akerberg, with Exhibits A to T, inclusive, thereto attached, in support thereof;

4. Notice of appearance of FCC;

5. Order permitting intervention of Mutual Broadcasting Company;

6. Stipulation and order granting suspension of Commission's Order;

[fol. 574] 7. Motion by United States of America and Federal Communications Commission to dismiss the complaint, or in the alternative for summary judgment, and affidavit of Telford Taylor, including Exhibit A therein referred to;

8. Affidavit of Fred Weber sworn to December 11, 1941, in opposition to motion for preliminary injunction; with Exhibits A to K, inclusive, thereto attached;

9. Affidavit of Telford Taylor in opposition to plaintiff's motion for preliminary injunction.

10. Plaintiff's additional affidavits:

Affidavit of Kenneth L. Yourd sworn to January 5, 1942, with Exhibit A thereto attached;

Affidavit of Herbert V. Akerberg sworn to January 5, 1942, with Exhibits A to H, inclusive, thereto attached;

Affidavit of Frank Stanton sworn to January 5, 1942, with Exhibit A thereto attached;

Affidavit of Edward Klauber sworn to January 5, 1942, with Exhibits A and B thereto attached;

11. Plaintiff's reply affidavit of Frank Stanton sworn to January 10, 1942, with Exhibits A to M, inclusive, thereto attached;

12. Affidavit of Frank Stanton sworn to December 12, 1941, with copy of December, 1941 issue of "Radio Advertising Rates and Data" attached:

13. Opinion of District Court;

14. Dissenting opinion of Judge Bright;

15. Order or decree dismissing complaint;

16. Petition for appeal;

17. Notice of appeal;

18. Assignment of errors;

19. Jurisdictional statement;

20. Supplemental jurisdictional statement;

21. Statement directing attention to provisions of Paragraph 3, Rule 12;

22. Defendants' waiver of right to file statement opposing jurisdiction.

23. Intervenor's waiver of right to file statement opposing jurisdiction.

[fols. 575-580] 24. Motion and notice of motion for order maintaining status quo pending appeal, and affidavit of William S. Paley sworn to February 25, 1942 in support thereof;

25. Per curiam opinion of the Court on order maintaining status quo pending appeal;

26. Findings of Fact and conclusion of law in support of order maintaining status quo pending appeal;

27. Order maintaining status quo until May 1, 1942, or argument of the appeal;

28. Order allowing appeal;

29. Citation of appeal;

30. Bond on appeal;

31. Stipulation and order directing Clerk to transmit original of Exhibit A attached to affidavit of Telford Taylor of November 5, 1941.

32. Praecipe

Said transcript to be prepared as required by law and the Rules of this Court, and the Rules of the Supreme Court of the United States, and is to be filed in the office of the Clerk of the Supreme Court.

Dated: March 5, 1942.

John J. Burns, Attorney for Columbia Broadcasting System, Inc.

Service of above praecipe accepted and acknowledged this 5th day of March, 1942. The defendant and the intervenors waive their right to file a designation of additional portions of the record.

Charles Fahy, Solicitor General, by C. R. Denny. Charles R. Denny, Jr.; Asst. General Counsel F. C. C. Lem Lauterstein, Solicitor for Mutual Broadcasting System, Inc.

33. Stip. re correctness of Record.
34. Clerk's Ctf.

[fol. 581] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 582] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed March 9, 1942

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this case are as follows:

I. The Court erred in dismissing the complaint upon the ground that the Court had no jurisdiction over the subject-matter of the cause.

II. The Court erred in failing to find, as it should have done, that it had jurisdiction to issue the injunction prayed for herein.

III. The Court erred in failing to consider on the merits plaintiff's application for preliminary injunction.

And the appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

[fol. 583] 1. Summons and complaint, together with Exhibits A to F, inclusive;

2. Order amending complaint;

3. Report of Federal Communications Commission on Chain Broadcasting, May, 1941; (furnished)

4. Motion for temporary restraining order and preliminary injunction;

5. Plaintiff's notice and motion for temporary restraining order and preliminary injunction;

6. Affidavit of William S. Paley, sworn to October 30, 1941, with Exhibits A and B thereto attached;

7. Affidavit of Herbert V. Akerberg, dated October 29, 1941, with Exhibits A to T inclusive thereto;

8. Appearance of The Federal Communications Commission;

9. Order permitting intervention of Mutual Broadcasting System, Inc.;

10. Stipulation and order granting suspension of Commission's order;

11. Motion by United States of America and The Federal Communications Commission to dismiss the complaint, ~~or in the alternative for summary judgment, and affidavit of~~ Telford Taylor, excluding Exhibit A therein referred to;

12. Affidavit of Fred Weber in opposition to motion for preliminary injunction; with Exhibits A to K inclusive;

13. Affidavit of Telford Taylor in opposition to plaintiff's motion for preliminary injunction, excluding Exhibit A incorporated therein by reference;

14. Plaintiff's additional affidavits comprising Volume III of the typewritten transcript of record on appeal, consisting of:

Affidavit of Kenneth L. Yourd sworn to January 5, 1942, with Exhibit A attached;

Affidavit of Herbert V. Akerberg sworn to January 5, 1942, with Exhibits A to H attached;

Affidavit of Frank Stanton sworn to January 5, 1942, with Exhibit A attached;

Affidavit of Edward Klauber sworn to January 5, 1942, with Exhibits A and B attached;

[fol. 584] 15. Plaintiff's reply affidavit of Frank Stanton sworn to January 10, 1942, with Exhibits A to M inclusive attached;

16. Opinion of the District Court;

17. Dissenting opinion of Judge Bright;

18. Order or decree dismissing complaint;

19. Petition for appeal;

20. Notice of appeal;

21. Assignment of errors;

22. Jurisdictional statement;

23. Supplemental jurisdictional statement;

24. Waiver of United States of America and The Federal Communications Commission of right to file statement opposing jurisdiction;

25. Waiver of Mutual Broadcasting System, Inc. of right to file statement opposing jurisdiction;

26. Motion and notice of motion for order maintaining status quo pending an appeal and affidavit of William S. Paley sworn to February 25, 1942 in support thereof, with Exhibit A thereto annexed;

27. Per curiam opinion of the District Court for order restraining The Federal Communications Commission from enforcing rules pending appeal;

28. Findings of fact and conclusion of law in support of order restraining The Federal Communications Commission from enforcing rules pending appeal;

29. Order restraining The Federal Communications Commission from enforcing regulations until May 1, 1942, or argument of the appeal;

30. Order allowing appeal;

31. Citation on appeal;

32. Stipulation and order directing Clerk to transmit original of Exhibit A attached to affidavit of Telford Taylor of November 5, 1941;

33. Certificate of Clerk of the District Court as to transcript of record.

Charles E. Hughes, Counsel for Appellant.

[fols. 585-586] Acknowledgment of Service

Service of the foregoing "Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed" is hereby acknowledged this 9th day of March, 1942. The appellees waive their right to file a counter designation.

Charles Fahy, Solicitor General for the United States of America; Charles R. Denny, Assistant General Counsel, Federal Communications Commission; Louis G. Caldwell, Attorney for Mutual Broadcasting System, Inc.

[fol. 587] [File endorsement omitted.]

[fol. 588] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—March 16, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 46,354. S. New York, D. C. U. S. Term No. 1026. Columbia Broadcasting System, Inc., Appellant, vs. The United States of America, Federal Communications Commission and Mutual Broadcasting System, Inc. Filed March 9, 1942. Term No. 1026 O. T. 1941.

U.S. Supreme 1025

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1026

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION AND MUTUAL BROADCASTING SYSTEM, INC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

JOHN J. BURNS,
CHARLES E. HUGHES, JR.,
Counsel for Appellant.

INDEX.

Subject Index.

	Page
Statement as to jurisdiction	1
Statutory provisions believed to sustain jurisdiction	2
Statute of the United States, and orders promulgated thereunder, the validity of which is involved	2
Date of judgment or decree and date of application for appeal	8
Nature of the case	8
Decisions believed to sustain jurisdiction	11
Appendix "A"—Opinion of the District Court of the United States for the Southern District of New York	12
Appendix "B"—Dissenting opinion of Bright, D. J.	22
Appendix "C"—Final decree	27
Supplement to jurisdictional statement	29
Exhibit "A"—Findings of fact and conclusion of law	30
Exhibit "B"—Per curiam opinion of the District Court of the United States for the Southern District of New York	32
Exhibit "C"—Waiver of the Solicitor General of the right to file a statement opposing jurisdiction	33
Exhibit "D"—Waiver of the Mutual Broadcasting System, Inc., of the right to file a statement opposing jurisdiction	34

Table of Cases Cited.

Alton Railroad Co. v. *United States*, 287 U. S. 229	11
American Telephone & Telegraph Co. v. *United States*, 299 U. S. 232	11
Powell v. *United States*, 300 U. S. 276	11
Rochester Telephone Corp. v. *United States, et al.*, 307 U. S. 125	11
Shannahan, et al. v. *United States*, 303 U. S. 596	11

Statutes Cited.

	Page
Communications Act of 1934, Ch. 652, 48 Stat. 1064, as amended 47 U. S. C. 151-609	2
Communications Act of 1934, Section 402a (47 U. S. C. 402a)	1, 2
Constitution of the United States:	
Article I, Sec. 1	10
First Amendment	10
Fifth Amendment	10
Judicial Code, Section 209 (28 U. S. C. A. 45)	
United States Code, Title 28, Sec. 41, subdivision 28	
Urgent Deficiencies Act of October 22, 1913, Chap. 32 (38 Stat. 219, 220, 28 U. S. C. 47 and 47a)	2

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant,

THE FEDERAL COMMUNICATIONS COMMISSION AND MUTUAL BROADCASTING SYSTEM, INC.,
Interveners.

JURISDICTIONAL STATEMENT.

This suit was instituted in the District Court of the United States for the Southern District of New York, under Section 402 (a) of the Communications Act of 1934 (47 U. S. C. Sec. 402 (a)) to set aside, annul and permanently enjoin the enforcement of an order of the Federal Communications Commission denominated "Commission Order in Docket No. 5060 in the Matter of the Investigation of Chain Broadcasting," dated May 2, 1941, as amended by order dated October 11, 1941, promulgating regulations applicable to radio stations engaged in chain or network broadcasting. Plaintiff moved for a preliminary injunction, and the United States and the Federal Communications Commission moved to dismiss the complaint or for summary judgment. The statutory three-judge court dismissed the complaint for want of jurisdiction over the subject-matter of the action.

Pursuant to Rule 12 of the Supreme Court of the United States, the petitioner in support of the jurisdiction of the Supreme Court to review the judgment, order and decree in question, respectfully represents:

I.

Statutory Provisions Believed to Sustain Jurisdiction.

The statutory provisions believed to sustain the jurisdiction of this appeal are:

Section 402 (a) of the Communications Act of 1934, 47 U. S. C. Sec. 402 (a), which makes the provisions of the Urgent Deficiencies Act applicable to this suit; and

The Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 219, 220; 28 U. S. C. Secs. 47, 47a, which provides for direct appeal to the Supreme Court of the United States from judgments or decrees of three-judge courts constituted under the Act.

II.

Statute of the United States, and Order Promulgated Thereunder, the Validity of Which is Involved.

The Federal Communications Commission, purporting to act under the authority of The Communications Act of 1934, ch. 652, 48 Stat. 1064, as amended, 47 U. S. C. Secs. 151-609, made the orders hereinafter set forth.

"Before The
Federal Communications Commission
Washington, D. C.

Commission Order in Docket No. 5060

In the Matter of the Investigation of Chain Broadcasting.

May 2, 1941.

"Whereas, the Commission on March 18, 1938, by Order No. 37, authorized an investigation 'to deter-

mine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity;'

"WHEREAS, on April 6, 1938, the Commission appointed a Committee of three Commissioners to supervise the investigation, to hold hearings in connection therewith, and 'to make reports to the Commission with recommendations for action by the Commission;'

"WHEREAS, the Committee held extensive hearings and on June 12, 1940, submitted its report to the Commission;

"WHEREAS, briefs were filed and oral arguments had upon the Committee report and upon certain draft regulations issued for the purpose of giving scope and direction to the oral arguments; and

"WHEREAS, the Commission, after due consideration, has prepared and adopted the Report on Chain Broadcasting to which this Order is attached;

"NOW, THEREFORE, IT IS HEREBY ORDERED, That the following regulations be and they are hereby adopted:

"3.101. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization [1] under which the station is prevented or hindered from, or penalized for broadcasting the programs of any other network organization. See Chapter VII, A, 1.

"3.102. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serv-

[1] The term 'network organization,' as used herein, includes national and regional network organizations. See Chapter VII, J.

ing a substantially different area from broadcasting any program of the network organization. See Chapter VII, A, 2; and J.

"3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise, for the affiliation of the station with the network organization for a period longer than one year: *Provided*, That a contract, arrangement, or understanding for a one-year period, may be entered into within sixty days prior to the commencement of such one-year period. See Chapter VII, B.

"3.104. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders the station from scheduling programs before the network finally agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time. See Chapter VII, C.

"3.105. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance. See Chapter VII, D.

"3.106. No license shall be granted to a network organization, or to any person directly or indirectly con-

trolled by or under common control [2] with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing. See Chapter VII, E.

"3.107. No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network. See Chapter VII, F.

"3.108. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs. See Chapter VII, G.

"IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further*, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties.

FEDERAL COMMUNICATIONS COMMISSION,
T. J. Slowie, *Secretary.*"

[2] The word 'control,' as used herein, is not limited to full control but includes such a measure of control as would substantially affect the availability of the tation to other networks.

On October 11, 1941, the Federal Communications Commission amended the aforesaid order as follows:

"FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C.

October 11, 1941.

ORDER

"At a meeting of the Federal Communications Commission held at its offices in Washington, D. C. on the 11th day of October, 1941,

"The Commission having under consideration the petition of the Mutual Broadcasting System, filed August 14, 1941, requesting that the Commission amend its order entered in Docket No. 5060 promulgating regulations applicable to radio stations engaged in chain broadcasting by modifying the regulations dealing with option time and the duration of affiliation contracts, having heard oral argument on said petition and having reconsidered its report and order in Docket No. 5060,

"IT IS ORDERED, That the Commission's order of May 2, 1941, entered in Docket No. 5060, BE, AND THE SAME IS HEREBY, AMENDED in the following particulars:

"Sections 3.102, 3.103, and 3.104 of the Regulations set forth in said order are hereby amended to read as follows:

"Section 3.102: No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which

the station is granted the first call in its primary service area upon the programs of the network organization.

"Section 3.103. No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided,* That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

"Section 3.104. No license shall be granted to a standard broadcast station which options [3] for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours [4] within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8 a. m. to 1 p. m.; 1 p. m. to 6 p. m.; 6 p. m. to 11 p. m.; 11 p. m. to 8 a. m.[5] Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

"[3] As used in this section, an option is any contract, arrangement, or understanding, express or implied, between a station and a network organization which prevents or hinders the station from scheduling programs before the network agrees to utilize the time during which such programs are scheduled, or which requires the station to clear time already scheduled when the network organization seeks to utilize the time.

"[4] All time options permitted under this section must be for specified clock hours, expressed in terms of any time system set forth in the contract agreed upon by the station and network organization. Shifts from daylight saving to standard time or vice versa may or may not shift the specified hours correspondingly as agreed by the station and network organization.

"[5] These segments are to be determined for each station in terms of local time at the location of the station but may remain constant throughout the year regardless of shifts from standard to daylight saving time or vice versa.

"The last paragraph of said order is hereby amended to read as follows:

'IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941; *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; and *Provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.'

T. J. SLOWIE,
Secretary."

III.

Date of Judgment or Decree and Date of Application for Appeal.

The date of the decree sought to be reviewed is February 21, 1942, on which day the said decree was made and entered.

The application for this appeal was made on February 27, 1942.

IV.

Nature of the Case.

The complaint filed pursuant to Section 402 (a) of the Communications Act of 1934, as amended, alleged, among others, the following facts:

The plaintiff is engaged in operating a nation-wide network broadcasting system, the operations consisting essentially of furnishing radio sustaining and sponsored programs for simultaneous broadcasting by radio stations to

which the programs are transmitted by wire. Most of these stations are neither owned nor leased by plaintiff, and the network programs are furnished to them pursuant to contracts with the stations, known as affiliation contracts.

The affiliation contracts provide, among other things, and subject to certain conditions and exceptions, that the station will not broadcast programs from any other network except special events of public importance; that the plaintiff will not furnish its programs to any other standard broadcasting station in the city in which the station is located, except in case of public emergency; and that the station will, upon not less than 28-days' notice from plaintiff, broadcast sponsored programs furnished to it by plaintiff subject to conditions therein specified. The contract is usually for a term of five years. These contracts constitute a relationship between the plaintiff and the affiliated stations which is and has been valuable and advantageous to both. The provisions of the contracts are indispensable to the efficient operation of the plaintiff's business and are necessary and essential for the creation and maintenance of the plaintiff's identity as a network and of its goodwill.

The stations operate solely by virtue of licenses issued by the Federal Communications Commission. By Regulations 3.101 to 3.105, inclusive, [set forth *supra* under part II hereof] the Federal Communications Commission has determined that it will not license any station having such affiliation contract after the effective date of the Regulations.

The licenses held by stations having affiliation contracts with plaintiff come up for renewal at various times commencing in the immediate future. Since the stations fear the loss of their broadcasting licenses, as a result of the regulations, they will not negotiate for, enter into or renew affiliation contracts with the plaintiff, and, as a result of the regulations, have threatened to cancel and repudiate

their affiliation contracts. Many stations have notified plaintiff that because of the regulations they will not be bound by their affiliation contracts after the regulations become effective.

The regulations impair seriously the ability of plaintiff to compete for national advertising, and plaintiff's ability to maintain its identity and the public goodwill which it has built up since its inception, and the ability of plaintiff to render a wide public service of informing, educating and entertaining the nation. The regulations will make the operation of plaintiff's business burdensome and more costly, reduce its earnings, compel plaintiff to change the fundamental character of its business and render its property and business less valuable. A network system of broadcasting, such as presently operated by plaintiff, and based upon the affiliation contracts containing the provisions alleged, is essential to the public interest, convenience and necessity, and indispensable to the fullest and most effective use of the radio facilities of the country.

The complaint further alleges that the order promulgating the rules is illegal and void and beyond the statutory power or authority of the Commission, and that if the Communications Act purports to authorize the Commission to make the regulations complained of, the said Act is an unconstitutional delegation of legislative power contrary to Article I, Section 1, of the Constitution of the United States, takes the property of plaintiff without due process of law in violation of Amendment V thereto, and because it constitutes an abridgement of the freedom of speech and of the press contrary to Amendment I thereto. The complaint sets forth the irreparable injury which the plaintiff would suffer as a result of the Commission's order and for which plaintiff has no adequate remedy at law, and prays that the Court set aside, annul and permanently enjoin the en-

forcement of that portion of the Commission's order which promulgates the regulations complained of.

The cause came on for hearing before a three-judge court convened pursuant to the provisions of the Urgent Deficiencies Act, on the plaintiff's motion for a temporary injunction, and on the defendant's motion to dismiss, or for summary judgment. After hearing, the Court dismissed the complaint "because the Court has no jurisdiction over the subject-matter of the action."

V.

Decisions Believed to Sustain Jurisdiction.

The following decisions are believed to sustain jurisdiction of this appeal:

Shannahan et al. v. *United States*, 303 U. S. 596 (1938);
Alton Railroad Co. v. *United States*, 287 U. S. 229 (1932);
Powell v. *United States*, 300 U. S. 276 (1937);
Rochester Telephone Corp. v. *United States et al.*, 307 U. S. 125 (1939); and
American Telephone & Telegraph Co. v. *United States*, 299 U. S. 232 (1936).

It is respectfully submitted that the United States Supreme Court has jurisdiction of this appeal.

Copies of the opinion delivered by the Court upon the rendering of the decree sought to be reviewed and the dissenting opinion of Judge Bright are attached to this statement as Appendices A and B thereto, respectively.

Respectfully submitted,

JOHN J. BURNS,
Attorney for Columbia Broadcasting System, Inc.

Dated February 27, 1942.

APPENDIX "A".

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil 16-178

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and Stromberg-Carlson Telephone Manufacturing Company, Plaintiffs,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, Defendants.

MUTUAL BROADCASTING SYSTEM, INC., Intervener.

Civil 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant,

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., Interveners.

Before: L. Hand, C. J.: Goddard and Bright, D. JJ.

Upon motions before answer by the defendants under Rule 12 (b) (1) to dismiss for lack of jurisdiction the complaints in two actions brought under sec. 402 (a) of Title 47, U. S. Code, to enjoin and set aside certain regulations of the Federal Communications Commission.

John T. Cahill, for National Broadcasting Company.

Charles E. Hughes, Jr., for the Columbia Broadcasting System.

Telford Taylor and Thomas E. Harris, for the United States and the Commission

Louis G. Caldwell, for the Mutual Broadcasting System, Inc., Intervener.

L. Hand, C. J.: These actions were brought to declare invalid and set aside certain regulations originally promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941; in their final form they appear at the end of this opinion. After the actions were filed the Commission, on October 31, 1941, promulgated a further regulation in the form of a "minute", also appearing at the end of the opinion. Preparatory to the issuance of the regulations the Commission had held hearings at which nearly 9,000 pages of testimony were taken; among others whom it had invited to attend, were the two plaintiff "networks", which accepted and took part by introducing extensive evidence. When the regulations appeared, the "networks" brought the two actions at bar under Sec. 402 (a) of Title 47, U. S. Code, to set them aside as beyond the powers of the Commission and as arbitrary, unreasonable and without basis in the evidence. Upon the complaints so filed and voluminous affidavits they then moved for a preliminary injunction against their enforcement pendente lite. In the action brought by the National Broadcasting Company, two "affiliated stations" have joined as parties plaintiff and the United States and the Commission were originally joined as defendants; in the action brought by the Columbia Broadcasting System it alone is plaintiff and the United States is the only defendant, but the Commission later intervened. A third "network", the Mutual Broadcasting System, intervened as a defendant in both actions. The United States and the Commission have countered the plaintiffs' motions by motions, made before answer, to dismiss the complaints for lack of jurisdiction over the subject-matter under Rule 12 (b) (1), and for summary judgment under Rule 56 (b). The Mutual Broadcasting System has answered and joined in the motions of the other defendants. All these motions having come on before Judge Goddard, he assembled a court composed of three judges, to whom the hearing was transferred in accordance with the Act of October 22, 1913 (38 St. L. 219).

Since we are deciding that the District Court for the Southern District of New York has no jurisdiction over the

subject-matter of the actions either as a court of three judges or of one, it will not be necessary to consider the merits; nevertheless we must say something about the background of the regulations in order to make our discussion intelligible. The business of broadcasting depends for its support principally, if not altogether, upon advertising. The broadcasting is done by "stations", each "station" selecting programs which it thinks will be popular, either spoken, sung or instrumentally performed in its own studio, or relayed to it by a "network" as will appear. Interjected among these programs, occur those fervid importunities of advertisers, upon the results of which the "station" must depend for its revenue. A single "station" dependent upon its own programs alone would be very expensive to operate, and its income would be small; especially if, as has become customary, it were to add to its advertising programs what are called "sustaining programs", which are not paid for, but which are thought to give a general popularity to the "station". These circumstances have long since resulted in the creation of "networks" of the kind with which the actions at bar are concerned; that is to say, in a widespread system of contracts of a single company with separate "stations" scattered all over the Union and known as "affiliates". The plaintiffs, National Broadcasting Company and the Columbia Broadcasting System, are two such "networks"; they own and operate broadcasting "stations" of their own, but, although they depend in part upon these as outlets, their principal reliance is upon their "affiliates". They originate a great variety of programs—usually in a studio of one of their owned "stations"—which they transmit by telephone to the "affiliates" for broadcasting. The audience of such a "network" in this way becomes the aggregate of the audiences of its "affiliated stations", and this enables it to charge so much higher prices for advertising than the "affiliates" could charge alone, that both they and the "network" can divide the returns to their common advantage. There are four such national "networks", two owned by the National Broadcasting Company (one of which we are told it has disposed of since these

actions were begun), another by the Columbia Broadcasting System, and the fourth by the Mutual Broadcasting System, which has intervened because it feels itself aggrieved by the practices against which the regulations in suit were directed.

Every broadcasting "station" must have a license and the Federal Communications Commission alone has power to grant, refuse, revoke, renew or modify licenses. The Commission also has "authority to make special regulations applicable to radio stations engaged in chain broadcasting." Sec. 303 (i). By virtue of these powers it assumed to promulgate the regulations now challenged, all of which, it will be observed, are no more than declarations of the conditions upon which the Commission will in the future issue licenses to "stations". The defendants' motions to dismiss the complaints are based upon the theory that these regulations are not "orders" within the meaning of sec. 402(a), and that therefore this court has no jurisdiction over them; indeed, that they are not "orders" of any sort, but merely announcements of the course which it will pursue in the future, whenever an "affiliated station" applies for a new license or for the renewal of an existing one. To this the "networks" reply that the regulations had an immediate effect; that they not only announced what would be the future practice of the Commission, but presently adjudicated the invalidity of the contracts between themselves and their "affiliates"; and that they have in fact already caused serious losses, because a number of "affiliates" have declared that they will be obliged to break their contracts when their licenses are renewed, and have thus made it impossible for the "networks" to accept large and valuable advertising contracts.

We do not think that we need commit ourselves generally as to what "orders" are reviewable under the Act of October 22, 1913 (38 St. L. 219), which sec. 402 (a) of Title 47, U. S. Code, incorporates by reference as the measure of our jurisdiction. So far as we have found, the Supreme Court has never declared that that statute authorizes review of any decision of an administrative tribunal which neither directs anyone to do anything, nor finally adjudicates a

fact to exist upon which some right or duty immediately depends. We agree that it is no answer that the decision challenged is "legislative" in character (The Chicago Junction Case, 264 U. S. 258, 263), and, as we have just implied, it is enough if it authoritatively determines the existence of a fact that at once sets in execution some sanction, though the decision itself be not in form a command. United States *v.* Baltimore & Ohio Railroad, 293 U. S. 454; Powell *v.* United States, 300 U. S. 276; Rochester Telephone Corporation *v.* United States, 307 U. S. 125; American Federation of Labor *v.* National Labor Relations Board, 308 U. S. 401, 408. (Colorado *v.* United States, 271 U. S. 153; Claiborne-Annapolis Ferry Co. *v.* United States, 285 U. S. 382; and United States *v.* Idaho, 298 U. S. 105, though they are of the same kind, are scarcely controlling, because they turned upon sec. 1 (20) of the Interstate Commerce Act.) But decisions which are no more than announcements of future administrative action have never, so far as we can find, been treated as within this statute. That does not necessarily imply that a person presently injured is without any remedy when the threatened action would be unlawful; the situation then may present all the elements upon which equity will intervene in ordinary course. Shields *v.* Utah Idaho Central Railroad Company, 305 U. S. 177. It may be that the plaintiffs at bar could bring such actions, in equity; at least it does not appear that recourse to them is positively forbidden, as was for example the case in Venner *v.* Michigan Central, 271 U. S. 127. But even so they would not be the actions at bar, which can be brought only under the statute, since otherwise the United States cannot be sued, or the Commission sued in this district, assuming that it was in any event possible to join it at all. Such actions would have to depend jurisdictionally upon the same facts as any other action against a public officer who threatens to do an unlawful act.

We should therefore have a great deal of doubt whether the regulations could in any view be regarded as "orders" which we could review under the Act of October 22, 1913 (38 St. L. 219), if the case came to us under the statute in vacuo. It does not, because, although, as we have said,

sec. 402 (a) incorporates if by reference, those orders are excepted which are mentioned in the parenthesis; to wit, all orders "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license." Relief from such orders is provided in sec. 402 (b), (c), (d), (e), and (f); it is by appeal to the Court of Appeals of the District of Columbia, and it is to be heard upon the record made at the hearing of an application by the Commission. The procedure upon such appeals is in substance the same as that which has now become standard for the review of the decisions of administrative tribunals in adversary proceedings. Consequently, if any of the "affiliates" of the plaintiff "networks" should hereafter apply for a renewal of their licenses; and if, as we assume it will, the Commission adheres to its regulations, the resulting modification of the license will be reviewable only in the Court of Appeals of the District and upon the record made at that hearing. We have seen, however, that the regulations are nothing more than a declaration—or if one chooses, a threat—by the Commission that it will impose those conditions upon any renewal of a license in the future. No change is made in the status of "affiliates" meanwhile; their existing contracts with the "networks" remain enforceable; nor has the Commission given any evidence of an intention to use them as the basis for a revocation of existing licenses under sec. 312 (a). On the contrary, the "minute" we have mentioned commits it to a contrary course. Hence, if these actions well lie, the plaintiffs have succeeded in substituting a different court and a different procedure from that which Congress has prescribed for the trial of precisely the same issues. This is inexorably true because here the only question is whether the Commission has power to impose the conditions mentioned in the regulations when a "station" applies for renewal; exactly the question which will determine the actual renewal of a license. The prescribed procedure will therefore be disregarded only because the putative wrong is merely threatened, instead of being in the very act of commission. What-

ever may ordinarily be the proper scope of the word "order" in the Act of October 22, 1913 (38 St. L. 219), it seems to us clear that Congress could not have intended such an anomalous result as will follow upon treating these particular regulations as such "orders".

To this the plaintiffs make two answers. First, they say that the threat itself has already caused them loss, as we have said. Possibly that might support an action to compel the Commission to raise the issues immediately, as by a revocation proceedings under sec. 312 (a); even so, it should not substitute another court for the Commission and the Court of Appeals, certainly not this court in an action against the United States and the Commission. We need not decide the point, however, because the "minute" we have quoted offers equivalent relief without risk to any "station" which may challenge the regulations. Next, the plaintiffs say that they may not be able to raise the issue in a proceeding for the renewal of a license, because the "affiliated stations" may fear to incur the Commission's displeasure. As to the National Broadcasting Company this is plainly untrue because two of its "affiliates" have joined it as plaintiffs. As to the Columbia Broadcasting System, its complaint, read most favorably, does perhaps allege that none of its "affiliates" will challenge the regulations when their licenses expire; at any rate, to avoid any doubts, we shall so assume, little as that seems likely to be the case. We may do so, because the issue is irrelevant anyway, for the plaintiff "networks" have an adequate remedy under sec. 402 itself. They allege—and there seems to be no question about it—that their interest will be adversely affected by the enforcement of the regulations; if so, they can appeal to the Court of Appeals of the District from any order imposing unlawful conditions upon an "affiliate's" license. Sec. 402 (b) (2). It is true that the section does not in terms provide that they shall also be heard in the proceeding before the Commission under sec. 309 (a) for the "renewal or modification of a station license;" but the Commission has itself answered that objection by sec. 1,102 of its regulations which permits intervention. An unreasonable refusal of the privilege so of-

fered would appear to be a good objection on appeal under sec. 402 (b) (2); for it is not likely that the statute which grants an appeal to all interested parties, meant not to give them the opportunity to make a record on which they can succeed upon that appeal. At any rate until the Commission shows some disposition to deny them a fair hearing in a proceeding for renewal of an "affiliate's" license, we are not to assume that it will do so. And even if that should appear, the resulting right of action, if any, would not, as we have said, be in this court or against the United States. For the foregoing reasons the *the* complaints will be dismissed for lack of jurisdiction over the subject-matter.

We do not understand that any findings of fact are proper under Rule 52 (a), which provides for such findings only in "actions tried upon the facts without a jury." It is true that the plaintiffs have moved for a preliminary injunction, and that the rule also requires findings "in granting or refusing interlocutory injunctions;" but we are not "refusing" any injunction. Once the complaints are dismissed for lack of jurisdiction, the motions become moot and we shall not pass upon them at all. We are therefore entering judgment in each action without findings.

Complaints dismissed for lack of jurisdiction.

(S.) LEARNED HAND.
(S.) HENRY W. GODDARD.

The Chain Broadcasting Regulations.

Sec. 3.101. *Exclusive affiliation of station.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for broadcasting the programs of any other network organization.

Sec. 3.102. *Territorial exclusivity.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the

former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

Sec. 3.103. *Term of affiliation.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, expressed or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

Sec. 3.104. *Option time.*—No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a. m. to 1:00 p. m.; 1:00 p. m. to 6:00 p. m.; 6:00 p. m. to 11:00 p. m.; 11:00 p m. to 8:00 a. m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

Sec. 3.105. *Right to reject programs.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for,

prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

Sec. 3.106. *Network ownership of stations.*—No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.

Sec. 3.107. *Dual network operation.*—No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided,* That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

Sec. 3.108. *Control by networks of station rates.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

The Minute of October 31, 1941.

Procedure in Docket No. 5060.

The Commission today adopted the following minute setting forth the procedure that it will follow in applying the policies announced in the Chain Broadcasting Regulations:

If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or

the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.

The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106, relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations.

APPENDIX "B".

BRIGHT, *D. J.*:

As I read the opinion of my brothers, they would dismiss for want of jurisdiction because nothing reviewable has been done, and that even after a license is denied, the only review thereof would be by appeal to the Court of Appeals in the District of Columbia.

By Section 402-a of the Communications Act of 1934, we have jurisdiction to enjoin, set aside, annul or suspend an

order of the Commission, except where it grants or refuses an application for a construction permit, for the granting, renewal or modification of a station license, or suspending a radio operator's license. These excepted matters can be reviewed only by appeal to the Court of Appeals aforesaid. This order, in my opinion, does not come within any of the excepted provisions. No application has been or is here made for any such relief, and the order sought to be reviewed does not arise out of any such application.

There is no question in my mind that the order sought to be reviewed is one which, under the terms of Section 402-a, we have jurisdiction to enjoin. It is designated by the defendants as a "commission order". It has the usual mandatory clauses found in orders. It was by its terms obviously entered after an investigation made upon the Commission's own motion to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience or necessity. It promulgates certain regulations, an obvious and attempted exercise of the Commission's rule-making power. It is clearly an attempt to make rules because at the time there was nothing else before the Commission upon which it could or did act. All of these rules, or regulations as they are called in the order, relate only to standard broadcasting stations having contracts with a net work organization, except rule 3.106, which relates to a license to be granted to a network organization having more than one station in a service area, and rule 3.107 which proscribes a broadcasting station affiliated with a network maintaining more than one net work. These rules do not apply to stations not affiliated with any net work. They apply only to contractual relations with net works, and in addition, prohibit the ownership by a net work of more than one station in a specified service area and the ownership by any organization of more than one net work. The order fixes as immediately the time when it shall become effective. In other respects it has all the earmarks of a final order.

That it was intended to be final is further evidenced by the Commission's report. It finds that the public interest "requires" the application of the regulations to stations

affiliated with regional as well as with national net works. It affirms its powers to do so under Section 303-(i) of the Communications Act, and clearly reveals that it is exercising its rule-making power when it queries whether the Commission can formulate into "general rules and regulations" the principles which it *intends* to apply in passing on individual applications. That its action is final is further emphasized by the statement, "We believe that the announcement of the principles *we intend to apply* in exercising our licensing power will expedite business and further the ends of justice. * * * The regulations we are now adopting are nothing more than the expression of the general policy *we will apply* in exercising our licensing power. The formulation of a regulation in general terms is an important aid to *consistency and predictability* and does not prejudice any rights of the applicant."

That it is exercising this rule-making power is further emphasized by another statement in its report, that Section 303-(i) gives the Commission specific power to make special regulations applying to radio stations engaged in chain broadcasting and that "no language could more clearly cover *what we are doing here.*"

What it has done emphasizes more the finality of its order, which is an affirmative direction that thereafter no standard broadcasting station shall contract in terms prohibited, and ultimately puts an end to service by net works under contracts now existing. In fact, I think that the regulations are intended to effect existing contracts for the effective date of the order is deferred until November 15th, 1941, "with respect to existing contracts, arrangements or understandings". This certainly is not a statement that the regulations shall not apply to existing contracts; it is merely a postponement as to when the axe will fall.

The particular agreements prohibited are presently contained in most of the affiliation contracts of the two complaining net works. They state those provisions are essential to the proper and successful conduct of their business, and in deciding the question of jurisdiction, I believe we must assume this to be true. It is also shown by them, without contradiction, that between the time the regulations were promulgated and the commencement of these actions,

not less than twenty-four broadcasting stations having affiliation contracts with N. B. C. have cancelled their contracts as a result of the order in question, and not less than twenty-four others having such contracts, have served notice that they do not intend to abide by the terms of such contracts unless they are conformed to the Commission's order. Similarly, it is shown by the affidavits submitted by C. B. S. that some of the stations affiliated with it are refusing to renew their affiliation contracts, some are threatening to cancel or repudiate them, and some have already cancelled on the ground that the rules in question prohibit them. There is thus a present injury.

It is suggested that the plaintiffs must wait until the Commission has ruled upon the application of a broadcasting station for a renewal of its license. Can it be said that the Commission will change its rules, in view of the positive statement it has already made with reference thereto and above quoted? Must these net works await the idle ceremony of a denial of a license before any relief can be sought when it is perfectly obvious that no relief will be given? And what relief could they get if they did wait? The networks are not to be licensed, only the individual stations who make application. But it is said the net works could intervene and be heard. All that might be said or urged in their behalf has doubtless been communicated to the Commission in the three years between March 18, 1938, and May 2, 1941, when the investigation was going on. Must they march up the hill and down again, with the probability of being met with the statement that the Commission has given the matter due consideration and has done what it intends to abide by, as it has definitely said in its report? It is said, however, that by a minute adopted after these actions were brought, the Commission has manifested its intention to permit the net works to intervene and be heard upon the subject of the granting or denial of the license. That minute refers obviously only to a station, and insofar as it attempts to change the nature of the order sought to be reviewed or to obviate a review would be abortive. *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433-452. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498-515.

This court has reviewed the rule-making power of this very Commission without being troubled by the question of jurisdiction. *A. T. & T. Co.* v. *U. S.*, 14 F. Supp. 121, affirmed 299 U. S. 232. That there can be a review of an order exercising the delegated legislative function of rate-making and rule-making is admitted in *U. S.* v. *Los Angeles R. R.*, 273 U. S. 299, 309. In *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, where bills were filed to enjoin orders prescribing methods of account, book-keeping and reports, jurisdiction was not questioned in a court always jealous of its jurisdiction. In *Kansas City Southern Railway* v. *U. S.*, 231 U. S. 423, jurisdiction was again assumed of a petition to declare invalid and to enjoin regulations relative to accounting. In *Skinner & Eddy Corp.* v. *U. S.*, 249 U. S. 557-562, which involved a refusal of a suspension of a tariff, jurisdiction was assailed, at least until after a further remedy was sought; and it was there stated that where contention was made that the Commission had exceeded its statutory powers, courts have jurisdiction of suits to enjoin even if the plaintiff had not attempted to secure redress before the Commission. In the *Assigned Car Cases*, 274 U. S. 564, suits were brought to enjoin and annul an order which prescribed a rule governing the distribution of cars among coal mines after an investigation by the Interstate Commerce Commission of its own motion, and no question of right of review was raised. And in *A. F. of L.* v. *Labor Board*, 308 U. S. 401, 408, it was admitted that administrative determinations which are not commands may for all practical purposes, determine rights as effectively as the judgment of a court and may be re-examined by courts under particular statutes providing for the review of orders. In *Pierce* v. *Society of Sisters*, 268 U. S. 510, suit was brought by a private school to restrain the enforcement of an Oregon statute which required primary education in public schools, and jurisdiction was sustained, Mr. Justice McReynolds writing that the suits were not premature, that the injury to the plaintiffs was present and very real and not a mere possibility in the remote future.

Dated: February 20, 1942.

(S.) JOHN BRIGHT,
U. S. D. J.

APPENDIX "C".

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., Interveners.

Before L. Hand, C. J. and Goddard and Bright, D. JJ.

This cause came on to be heard at the January 1942 term of this court and was argued by counsel; and thereupon, and upon consideration thereof, it is

Ordered, Adjudged and Decreed that the complaint herein be, and the same hereby is, dismissed because the court has no jurisdiction over the subject-matter of the action.

(Signed) LEARNED HAND,
Circuit Judge,

(Signed) HENRY W. GODDARD,
District Judge,

———— ——,
District Judge.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 16-179

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant,

THE FEDERAL COMMUNICATIONS COMMISSION AND MUTUAL BROADCASTING SYSTEM, INC.,
Interveners.

Supplement to Jurisdictional Statement.

Supplementing the jurisdictional statement filed in the statutory District Court on February 27, 1942, the petitioner respectfully represents:

Subsequent to the filing of the jurisdictional statement herein, and prior to allowance of an appeal to the Supreme Court of the United States, the District Court, on application of the petitioner herein, duly made and entered an order restraining the Federal Communications Commission until May 1, 1942, or the argument of the appeal in the Supreme Court of the United States, whichever is earlier, from enforcing those regulations which were issued in their amended form on October 11, 1941 and which are known as "Order in Docket No. 5060".

In connection with the making of said order preserving the *status quo* pending appeal, the District Court made Findings of Fact and a Conclusion of Law, a copy of which

is annexed hereto as Exhibit "A", and rendered an Opinion, a copy of which is annexed hereto as Exhibit "B".

Dated, March 5, 1942.

Respectfully submitted,

JOHN J. BURNS,
Attorney for Columbia Broadcasting System, Inc.

EXHIBIT A.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 16-179.

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant,

FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., Interveners.

Findings of Fact.

I. That if the Federal Communications Commission pending the plaintiff's appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; and if this court —contrary to its said judgment—has in fact jurisdiction over the cause of action stated in the complaint; the plaintiff will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two months or until the appeal can be argued, whichever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate with the injury to the plaintiff arising from enforcement, if the conditions mentioned in the First Finding exist.

Conclusion of Law.

That the plaintiff is entitled to a stay pending its appeal to the Supreme Court; said stay being an order forbidding the Federal Communications Commission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of May, 1942, whichever is earlier.

LEARNED HAND,
U. S. C. J.

HENRY W. GODDARD,
U. S. D. J.

JOHN BRIGHT,
U. S. D. J.

EXHIBIT "B".

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

Civil Action No. 16-178.

NATIONAL BROADCASTING COMPANY, INC., WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY and STROMBERG-CARLSON TELEPHONE MANUFACTURING COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION, Defendants.

MUTUAL BROADCASTING SYSTEM, INC., Intervener.

Civil Action No. 16-179.

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant.

THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., Interveners.

Before L. Hand, C. J.; Goddard and Bright, D. JJ.

PER CURIAM:

The Commission is of course right in saying that we have decided that the plaintiffs have adequate protection outside of these actions and in spite of their dismissal; nevertheless, in deciding whether a stay should be granted pending an appeal, we must assume that we may be mistaken, certainly a not unreasonable assumption in view of Judge Bright's dissent. If so, the plaintiffs will not be adequately protected, and indeed they may not be anyway if the Commission does not withhold enforcement in all cases until the issues could be once and for all determined in a renewal proceeding. Considering on the one hand that if the regulations are enforced the networks will be obliged to revise their whole plan of operations to their great disadvantage, and on the other that the Commission itself gave no evidence before these actions were commenced that the pro-

posed changes were of such immediately pressing importance that a further delay of two months will be a serious injury to the public, it seems to us that we should use our discretion in the plaintiff's favor to stay enforcement of the regulations until they can argue their appeal. For these reasons we will grant such a stay until the argument of the appeal before the Supreme Court or the first day of May, 1942, whichever comes first. For any further stay the plaintiffs must apply to the Supreme Court itself, or to the Circuit Justice.

LEARNED HAND,
U. S. C. J.

HENRY W. GODDARD,
U. S. D. J.

JOHN BRIGHT,
U. S. D. J.

EXHIBIT "C".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant

and

THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., Interveners.

Waiver.

Appellees United States of America and Federal Communications Commission hereby waive their right to file a statement opposing jurisdiction in this case.

CHARLES FAHY,
Solicitor General.

(Signed) TELFORD TAYLOR,
General Counsel,
Federal Communications Commission.

March 4, 1942.
3w

EXHIBIT "D".

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 16-179

COLUMBIA BROADCASTING SYSTEM, INC., Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant

and

THE FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., Interveners.

Waiver.

Appellee, Mutual Broadcasting System, Inc., hereby waives its right to file a statement opposing jurisdiction in this case, as provided in Rule 12, paragraph 3, Revised Rules of the Supreme Court of the United States.

LEON LAUTERSTEIN,
By EMANUEL DANNETT,
a member of the firm,
Attorney for Mutual Broadcasting System, Inc.,
15 *William Street,*
New York, New York.

Of Counsel:
TOWNLEY, UPDIKE & CARTER,
220 *East 42d Street,*
New York, New York.
KIRKLAND, FLEMING, GREEN, MARTIN & ELLIS,
By LOUIS G. CALDWELL,
HAMMOND E. CHAFFETZ,
DONALD C. BEELAR,
PERCY H. RUSSELL, JR.,
914 *National Press Building,*
Washington, D. C.

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 13 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1026

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,
Respondents.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

CHARLES E. HUGHES, JR.,
JOHN J. BURNS,
ALLEN S. HUBBARD,
HAROLD L. SMITH,
RICHARD W. HOGUE, JR.,
WRIGHT TISDALE,
Counsel for Appellant.

INDEX

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	3
STATUTE INVOLVED	3
STATEMENT	3
SPECIFICATION OF ERRORS	21
ARGUMENT	21
FIRST: The Communications Act of 1934 contains no warrant for relegating Columbia to intervention before the Commission upon applications of individual stations for renewal of their licenses, and appeals to the Court of Appeals of the District of Columbia under Section 402(b) from the Commission's action thereon	23
(a) The Act discloses no legislative intention to exclude the order here involved from review under Section 402(a)	23
(b) The suggested substitute procedure of intervention on particular license applications, and appeal under Section 402(b), is either unavailable to Columbia or inadequate	27
(1) The suggested substitute procedure is completely unavailable to Columbia if its affiliated stations fail to contest the Commission's order but submit to its requirements	27

PAGE

(2) Even if a station does contest, the suggested substitute procedure is wholly inadequate 31

(c) Proceedings on the application of an individual station for renewal of its license do not afford an appropriate review of the Commission's order here in question 34

SECOND: The requirements for a suit under the Urgent Deficiencies Act, made applicable by Section 402(a) of the Communications Act of 1934, are satisfied in this case 35

(a) This case satisfies the conventional requisites of equity jurisdiction 36

(1) Columbia has standing to sue 36

(2) The suit is not premature 39

(b) The order complained of is an "order" within the meaning of the Act 42

CONCLUSION 52

APPENDIX 53

CASES CITED

PAGE

Alexander Sprunt & Son, Inc. v. *United States*, 281 U. S. 249 38
American Federation of Labor v. *National Labor Relations Board*, 308 U. S. 401 46
American Telephone & Telegraph Co. v. *United States*, 14 F. Supp. 121, aff'd 299 U. S. 232 47
Assigned Car Cases, 274 U. S. 564 ..... 24, 48

Carter v. *Carter Coal Co.*, 298 U. S. 238 41
Central Mexico Light & Power Co. v. *Munch*, 116 F. (2d) 85 13
Chicago Junction Case (The), 264 U. S. 258 ..... 24, 38
Chicago, R. I. & P. Ry. Co. v. *United States*, 284 U. S. 80 48
City Bank Farmers Trust Co. v. *Schnader*, 291 U. S. 24 41
Claiborne-Annapolis Ferry Co. v. *United States*, 285 U. S. 382 38
Corona Coal Co. v. *Southern Railway Co.*, 260 U. S. 698, aff'g 266 Fed. 726 48

Delaware & Hudson Co. v. *United States*, 266 U. S. 438 51

Ellis v. *Stevens*, 37 F. Supp. 488 14

Federal Communications Commission v. *Columbia Broadcasting System of California, Inc.*, 311 U. S. 132 ..... 21, 24, 26
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134 33
Federal Power Commission v. *Pacific Power & Light Co.*, 307 U. S. 156 36
Federal Radio Commission v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266 36

PAGE

Hazelwood, Inc., Orlando, Florida (In re application of), Docket No. 5698, decided Sept. 29, 1939 32

Inland Steel Co. v. *United States*, 306 U. S. 153 35

Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 42 .....35, 38

Interstate Commerce Commission v. *Goodrich Transit Company*, 224 U. S. 194 48

Kansas City So. Ry. Co. v. *United States*, 231 U. S. 423 48

Kentucky-Tennessee Light & Power Co. v. *Nashville Coal Co.*, 37 F. Supp. 728 14

Lambert Run Coal Company v. *Baltimore & Ohio Railroad Co.*, 258 U. S. 377 48

Matheson Radio Co., Inc. (In re), 2 Pike and Fischer Admin. Law, 41g.23-1 32

Peavey & Co. (F. H.) v. *Union Pacific Railroad Co.*, 176 Fed. 409, modified and affirmed *sub nomine Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42 35

Pennsylvania v. *West Virginia*, 262 U. S. 553 .....38, 40

Pierce v. *Society of Sisters*, 268 U. S. 510, aff'g 296 Fed. 928 .....37, 40

Powell v. *United States*, 300 U. S. 276 45

Rochester Telephone Corp. v. *United States*, 307 U. S. 125 .....35, 36, 43, 48, 49, 50

Scripps-Howard Radio, Inc. v. *Federal Communications Commission*, No. 508, October Term, 1941, decided April 6, 1942, 10 U. S. Law Week 4322 21, 25, 26, 31

Shannahan v. *United States*, 303 U. S. 596 50

Skinner & Eddy Corp. v. *United States*, 249 U. S. 557 38

Staley Mfg. Co. (A. E.) v. *Secretary of Agriculture*, 120 F. (2d) 258 38

PAGE

Terrace v. *Thompson*, 263 U. S. 197 ..... 38, 41
Truax v. *Raich*, 239 U. S. 33 36

United States v. *Abilene & Southern Railway Co.*, 265 U. S. 274 40
United States v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454 47
United States v. *Illinois Cent. R. R. Co.*, 244 U. S. 82 .. 51
United States v. *Los Angeles & Salt Lake Railroad Co.*, 273 U. S. 299 50
United States v. *Morgan*, 307 U. S. 183 35
United States v. *Village of Hubbard*, 266 U. S. 474 .. 38

Village of Euclid v. *Ambler Realty Co.*, 272 U. S. 365 . 41

Waite v. *Macy*, 246 U. S. 606 41

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

	PAGE
United States Constitution	
Art. III, Sec. 2	35
Communications Act of 1934	
Title III	
Sec. 303(i)	42, 47
Sec. 307	25
Sec. 307(d)	10
Sec. 308	25
Sec. 309	25
Sec. 309(a)	29, 32
Sec. 312(a)	25, 29, 44
Title VI	
Sec. 402	3, 21, 23, 25
Sec. 402(a)	1, 2, 3, 21, 22, 23, 24, 25, 26, 27, 35, 48
Sec. 402(b)	3, 21, 22, 23, 24, 25, 27, 31, 34, 35
Sec. 402(c)	22
Sec. 402(d)	22
Sec. 402(e)	22
Sec. 402(f)	22
Urgent Deficiencies Act	2, 24, 25, 35, 38, 45, 48

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,
Respondents.

No. 1026

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

This is an appeal by the plaintiff, Columbia Broadcasting System, Inc., from a final decree of the District Court of the United States for the Southern District of New York dismissing the complaint for want of jurisdiction over the subject matter of the suit.

The suit is one to set aside, annul and permanently enjoin the enforcement of an order of the Federal Communications Commission promulgating regulations applicable to radio stations engaged in chain or network broadcasting on the grounds, among others, that it is beyond the statutory authority of the Commission, and that, if the statute were construed to confer such authority, it would be unconstitutional. It was instituted against the United States under Section 402(a) of the Communications Act

of 1934 (48 Stat. 1064, 1093; 47 U. S. C., Sec. 402(a)), which made applicable the provisions of the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219, 220; 28 U. S. C., Secs. 41(28), 43-48, inclusive) with respect to suits to enjoin, set aside, annul or suspend orders of the Interstate Commerce Commission. The Federal Communications Commission and Mutual Broadcasting System, Inc. intervened as defendants.

Appellant moved for a preliminary injunction and the United States and the Federal Communications Commission moved to dismiss the complaint or for summary judgment. A statutory three-judge court, convened under the Urgent Deficiencies Act, granted the motion to dismiss and refused to act upon the motion for preliminary injunction.

OPINIONS BELOW

The majority opinion (Learned Hand, *C.J.*, and Goddard, *D.J.*, R. 456) and the dissenting opinion (Bright, *D.J.*, R. 466) are not yet reported.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions for direct appeal in the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219, 220; 28 U. S. C., Secs. 47, 47a), made applicable by Section 402(a) of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C., Sec. 402(a)). The decree appealed from (R. 470) was entered February 21, 1942 (R. 471). The application for this appeal (R. 471) was made February 27, 1942, and appeal was allowed (R. 483) on March 2, 1942.

This Court noted probable jurisdiction on March 16, 1942.

QUESTION PRESENTED

Whether appellant is entitled to review an order of the Federal Communications Commission, promulgating regulations which affect its contractual relations with broadcasting stations and thereby impair its ability to carry on its business, in a suit under the provisions of Section 402(a) of the Communications Act of 1934; or is confined to intervention before the Commission upon applications by such stations for renewal of their licenses, and appeal under Section 402(b) of the Act from the Commission's action thereon.

STATUTE INVOLVED

The statute involved is Section 402 of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C., Sec. 402) which is printed in full in the appendix.

STATEMENT

Appellant (hereafter sometimes referred to as "Columbia") is, and for many years has been, engaged in the business of operating a nation-wide network radio broadcasting system. This operation consists essentially of the furnishing of radio programs for simultaneous broadcasting thereof by broadcasting stations to which the programs are transmitted by wire from a central point of origination (Complaint, Pars. Third and Fourth, R. 2, 3).

This business, which is substantial (Complaint, Par. Third, R. 2), is based principally upon contracts, called "affiliation contracts", between Columbia and various broadcasting stations located in cities throughout the coun-

try. Columbia supplies network programs to 123 stations in 122 cities, so distributed that the programs can be heard by over 90% of the listening audience of the nation. Only eight of these stations are operated by Columbia itself; of these eight, seven are owned by Columbia and one leased by it. The remaining 115 stations are all independently owned and operated, and Columbia's relationship with them depends solely upon the terms of the affiliation contracts. These stations are known as "affiliated" stations or "affiliates" (Complaint, Pars. Third and Fourth, R. 2, 3).

The Commission's order, to set aside which this suit was brought, is directed primarily at network operations as carried on through such affiliation contracts. It aims to outlaw the very provisions which are most significant and essential to the relationship between Columbia and its affiliates. It does this by providing, in a series of regulations promulgated by the order, that "No license shall be granted to a standard broadcast station" having any contract with a network organization which contains the proscribed provisions. No broadcasting station can operate at all except by virtue of a license from the Commission. Hence, to remain on the air, the affiliated stations must get rid of their contracts with Columbia, or the forbidden provisions thereof, at the latest before their existing licenses expire and they apply for renewal thereof (Complaint, Pars. Fourth, Fifth, Sixth, Seventh and Ninth, R. 3-7, 9-10). The Commission's order, therefore, while ostensibly directed at the conduct of the affiliated stations, in reality strikes at the foundation of Columbia's business as a network.

The complaint as amended (R. 1-12, 47-48) sets forth a brief statement of the facts constituting Columbia's cause of action. It alleges the general nature of Columbia's opera-

tions as a network organization and the substantial character of the business which it has developed (Pars. Third and Fourth); the material terms of the principal provisions of the affiliation contracts and their importance to Columbia's operations (Pars. Fifth and Sixth); the terms of the Commission's order, in so far as it affects Columbia (Par. Seventh); the history of the proceedings before the Commission (Par. Eighth); the effect of the order upon Columbia's business (Pars. Ninth and Tenth); the grounds of Columbia's assertion of the invalidity of the order (Pars. Eleventh, Twelfth and Thirteenth); and the irreparable injury that Columbia will suffer unless its enforcement be enjoined (Par. Fourteenth).

To the complaint as amended are attached several exhibits. Exhibit A (R. 12-17) is the typical form of Columbia's affiliation contracts. Exhibit B (R. 17-20, 49-219), contains the original order of the Commission dated May 2, 1941, and the Report which accompanied it, the latter including the dissenting views of Commissioners Case and Craven. Exhibit C (R. 20-36) is the Commission's opinion on rehearing and the amending order of October 11, 1941 and the dissenting opinion of Commissioners Case and Craven. Exhibit D (R. 36-38) is the Commission's order of March 18, 1938 instituting the chain broadcasting investigation, the proceeding in which the Commission's order complained of was made; and Exhibits E and F (R. 39-43, 43-46) comprise certain notices issued by the Commission in the course of that proceeding.

The American system of furnishing broadcasting service without cost to the listening public is based upon the sale of broadcasting time for advertising purposes. This is a matter of common knowledge and is the basic hypothesis of the Commission's Report. The programs which are

broadcast are of two kinds, "commercial" or "sponsored" programs, which are those sponsored by an advertiser who pays for their broadcasting, and "sustaining" programs which are not paid for by any advertiser but, when of network origin, are furnished by the network (Complaint, Par. Fourth, R. 3). Since the broadcasting industry has, substantially speaking, no revenue except that derived from sale of station time to advertisers, the commercial programs must carry the sustaining ones financially. The Commission said in its Report of May 2, 1941 (R. 61):

> "The eventual success of the practice of selling radio time to advertisers, and the development of network broadcasting, are the foundation stones of the commercial structure of radio broadcasting today."

The affiliation contracts create a cooperative joint enterprise, comprising Columbia and its affiliated stations, designed to compete as a unit, both with other networks and with other advertising media such as national magazines and newspapers, for the advertiser's dollar.

By Paragraph 1 of the contract (R. 13) Columbia agrees to furnish to the Station all available network sustaining programs without charge, and network sponsored (commercial) programs for which clients may request broadcasting by the Station and which are consistent with Columbia's sales and program policies, and agrees to make available to the Station an average of at least sixty hours per week of network sustaining and sponsored programs. Paragraph 3 (R. 14), and the schedule therein referred to, provide the rates at which Columbia pays the Station for broadcasting network sponsored programs.

By Paragraph 2 (R. 13-14) the Station agrees to broadcast all network sponsored programs furnished to it, subject

to certain conditions, one being that, except in connection with occasional special events, the Station need not broadcast network sponsored programs totaling more than 50 "converted hours" (this being on the average equivalent to 79 clock hours, Complaint, Par. Fifth, R. 4) per week, and another being that the Station may require Columbia to give not less than 28 days' prior notice of the commencement of sponsored programs for new accounts. This provision is the so-called "option time" clause, the effect of which is to give Columbia an exclusive option, exercisable on 28 days' notice, on 50 converted hours per week of the Station's time.

By Paragraph 8 (R. 15) Columbia agrees to make the Station the exclusive Columbia outlet in the city in which it is located and not to furnish its exclusive network programs to any other station in that city, except in case of public emergency; and the station agrees to operate as the exclusive Columbia outlet in that city and to so publicize itself, and not to join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations, except to broadcast special events of public importance.

Paragraph 15 (R. 17) provides the term of the contract which (Complaint, Par. Fifth, R. 4) is usually five years.

The Commission's order complained of, as amended, promulgated eight regulations (Exhibits B and C to Complaint, R. 17-20, 32-34) numbered 3.101 to 3.108, inclusive. Regulations 3.107 and 3.108 are not applicable to Columbia. Of the remaining six, Regulations 3.101 to 3.105 affect Columbia's affiliation contracts, and Regulation 3.106 affects Columbia's right to continue operation of one or more of its own stations.

Regulation 3.101 (R. 18) provides that no license shall be granted to a station having any contract with a network organization which prevents the station from broadcasting programs of any other network organization; and Regulation 3.102, as amended (R. 32), provides, among other things, that no license shall be granted to a station having any contract with a network organization which prevents another station serving substantially the same area from broadcasting the network's programs not taken by the former station, with a proviso that this regulation shall not be construed to prohibit a contract whereby the station is granted the first call in its primary service area upon the programs of the network organization. These two regulations would prohibit the substance of Paragraph 8 of the contract containing the reciprocal covenants making the station the exclusive Columbia outlet in the city in which it is located and Columbia the exclusive supplier of network programs for that station.

Regulation 3.103, as amended (R. 32-33), provides that no license shall be granted to a station having any contract with a network organization providing for affiliation for a period longer than two years. This would outlaw the five-year term, which is the normal term of Columbia's contracts with its stations.

Regulation 3.104, as amended (R. 33), contains such drastic prohibitions with respect to the "option time" provisions of Paragraph 2 of the affiliation contract as to make them practically valueless to Columbia. It provides, among other things, that no license shall be granted to a station which options for network programs any time subject to call on less than 56 days' notice (instead of the 28 days now provided) or more time than a total of three hours within each of four defined segments of the broadcast day

(instead of the maximum of 50 converted hours now provided). But, more importantly, it provides that even such options may not be exclusive as against other network organizations, and may not prevent the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations. The effect of this is to outlaw any option of time which would be good as against competing networks.

The effect of Regulations 3.101, 3.102 and 3.104 together is to destroy the network as a joint enterprise, of which the network organization and all its affiliated stations are cooperating members, and to compel a condition whereby, regardless of affiliation relations, every station is available to every network on a "first come, first served" basis. The proviso to 3.102 permits an arrangement whereby an affiliated station might be granted first call upon programs of its network; but 3.104 prohibits any arrangement whereby the network may be given first call upon the time of its affiliated stations. This strikes at the root of the existing affiliation system.

The remaining regulation affecting the affiliation contract, Regulation 3.105 (R. 18-19), provides, among other things, that no license shall be granted to a station having any contract with a network organization which prevents the station from rejecting, in certain described circumstances, network programs. If this regulation were reasonably applied it would not have any considerable effect upon Columbia's practices, since the affiliation contract (Par. 2, R. 13-14) contains liberal provisions on this subject. If, however, the regulation were construed to permit stations to reject network commercial programs which they have already agreed to accept simply because they preferred another commercial program, the effect would be further to weaken the affiliation relationship.

Regulation 3.106 (R. 19) is directed, not at the affiliation contract, but at operation of stations by network organizations. It provides, in so far as it applies to Columbia, that no license shall be granted to a network organization for a station in any locality where the existing stations are so few or of such unequal desirability (in terms of coverage, power, frequency or other related matters) that competition would be substantially restrained by such licensing. This regulation, as construed by the Commission in its Report (R. 124), would require Columbia to dispose of the station owned by it at Charlotte, N. C., and would raise serious doubts whether Columbia would be allowed to continue its ownership of its stations at Minneapolis and Washington, D. C. (Complaint, Par. Seventh, as amended, R. 48).

The regulations relating to the affiliation contracts were intended not only to prohibit the making of future contracts which might contain the proscribed provisions, but to affect existing contracts which include such terms. This results necessarily from the fact that the licenses issued by the Commission are of shorter duration than the usual affiliation contract. Under Section 307(d) of the Communications Act of 1934 no license for the operation of a broadcasting station shall be for a longer term than three years, and under the Commission's practice the actual term of the license has always been much below that maximum. The Complaint alleges (Par. Ninth, R. 9) that it has been the practice of the Commission to renew the licenses of stations annually* and that the licenses held by Columbia's affiliated stations come up for grant or refusal of a renewal thereof at various times commencing in the

---

*Since October, 1941, licenses have been issued for a two-year term.

immediate future. It follows that, if a station should make application for renewal of a license expiring, say next month, and should have a contract with Columbia containing the forbidden conditions and having several more years of its term to run, renewal of the license would be denied under the language of the regulations that "No license shall be granted to a standard broadcast station having any contract" containing these provisions. The only way that the station could get a renewal would be to get rid of its subsisting contract with Columbia or at least of those provisions thereof.

The fact that the order did affect, and was intended to affect, existing affiliation contracts is explicitly recognized by the last provision of the original order of May 2, 1941 (Ex. B to Complaint, R. 20):

> "IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further*, That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties."

The effective date of the regulations, with respect to existing contracts, arrangements or understandings, after having been postponed by the Commission in the meanwhile (R. 452), was deferred until November 15, 1941 by the last provision of the amending order of October 11, 1941 (Ex. C to Complaint, R. 33-34) by language otherwise identical with that above quoted from the original order of May 2, 1941. The suspension of the effective date of the regulations was continued by the court

below, by an order entered on stipulation of the parties on November 12, 1941, until the determination of Columbia's motion for preliminary injunction (R. 455); and after the decision here appealed from, and before allowance of the appeal, the court below entered an order restraining the Commission from enforcing the regulations until May 1, 1942, or the argument of the appeal herein in this Court, whichever is earlier (R. 482). In its unanimous *per curiam* opinion upon the granting of such stay the court below recognized (R. 480) that "if the regulations are enforced the networks will be obliged to revise their whole plan of operations to their great disadvantage".

Both the disruption of Columbia's plan of operations which would be attendant upon enforcement of the Commission's order, and the detriment which Columbia would suffer thereby, amply appear in the record.

They are set forth in the complaint (R. 1-12) in the concise form appropriate to a pleading. It is alleged: that prior to May 2, 1941 stations licensed by the Commission have had a reasonable expectancy of the annual renewal of their licenses, and it has been the practice of the Commission to renew such licenses annually (Par. Ninth); that the Commission has determined that it will revoke, or deny the renewal of, the license of any station having an affiliation contract of the kind now existing, after the effective date of the regulations, with the result that the stations face the loss of their licenses if they perform or continue in force or renew any of their existing contracts containing the prohibited provisions (Par. Ninth); that stations now affiliated with Columbia threaten to and will cancel or repudiate subsisting affiliation contracts, many stations having already notified Columbia that they will not be bound by their contracts after the date when the regulations become

effective as to existing contracts, and that Columbia will be unable to negotiate either renewal of existing contracts with its present affiliates or new affiliation contracts with other stations (Pars. Ninth, Fourteenth); that Columbia's ability to negotiate contracts with advertisers, in competition with other national advertising media, such as magazines and other publications of national circulation, outdoor advertising and the like, as well as to negotiate other sorts of contracts, will be destroyed or seriously impaired (Pars. Sixth, Tenth, Fourteenth); that the enforcement of the regulations would seriously impair Columbia's ability to maintain its identity, and the public goodwill which it has built up, and its ability to render a wide public service of informing, educating and entertaining the nation, would make operation of Columbia's business burdensome and more costly, reduce its earnings, compel it to change the fundamental character of its business and render its property and business substantially less valuable (Pars. Tenth, Fourteenth).

Affidavits* submitted to the court below supported these allegations of the complaint with circumstantial and evidentiary detail.

---

*The Government's motion, dated November 7, 1941, to dismiss the complaint or in the alternative for summary judgment (R. 449) was made "upon the compliant herein and upon the annexed affidavit of Telford Taylor, verified the 5th day of November, 1941, and exhibit referred to therein and filed therewith, and upon all the other papers and proceedings heretofore filed and had herein". The Government's motion and the appellant's motion for preliminary injunction were heard together. Such of appellant's affidavits herein referred to as were not served prior to the date of the Government's motion, and so included among the papers on which it was made, were submitted to the Court with no limitation to any particular motion. Where the question is of the jurisdiction of the court over the subject matter of the action, affidavits may be considered upon a motion to dismiss. *Central Mexico Light & Power Co.* v.

The affidavit of Herbert V. Akerberg, Vice President of Columbia in charge of the Station Relations Department, verified October 29, 1941, states (R. 261-263) that the termination dates of Columbia's affiliation contracts are staggered so that they terminate in different years and at different times during the year; that the Station Relations Department is therefore continually engaged in commencing, continuing and completing negotiations for renewal of such agreements; that negotiations for renewal of expiring affiliation contracts ordinarily require from one to six months, and negotiations for contracts with stations not yet affiliated from three months to a year; that not only do the regulations make impossible such negotiations but, as a result of them, many stations have cancelled or repudiated, and many others have threatened to cancel or repudiate, their affiliation contracts even prior to the effective date of the order. Copies of communications to that effect received by Columbia from its affiliated stations prior to October 29, 1941, the date of the affidavit, are attached as Exhibits A to T thereto (R. 263-285); and copies of similar communications received subsequent to that date are attached to Mr. Akerberg's later affidavit verified January 5, 1942 as Exhibits D, E, F, G and H thereto (R. 312-316).

These communications show that many of Columbia's affiliated stations are not willing to await the expiration of their licenses before taking steps to conform their affilia-

---

Munch, 116 F. (2d) 85, 87 (C. C. A., 2nd Circ.); *Elkis* v. *Stevens*, 37 F. Supp. 488, 490 (D. C., D. Mass.); *Kentucky-Tennessee Light & Power Co.* v. *Nashville Coal Co.*, 37 F. Supp. 728, 736 (D. C., W. D. Ky.). We confine our references to affidavits to those parts which bear upon the immediateness of the effect of the order, and the injury sustained by Columbia as a result of the order, subjects which are manifestly germane to the question of jurisdiction, particularly in view of the grounds upon which the majority based its decision.

tion contracts with the requirements of the Commission's order. Columbia therefore would be obliged to conduct its business on the basis that those stations were no longer affiliated in any significant sense with its network. They would accept programs from competing networks and they would not even give Columbia an option good against other networks upon any part of their time, since the prohibition against optioning time applies not only to a written contract therefor but to any "arrangement, or understanding, express or implied" (Reg. 3.104, footnote 1, R. 33).

This would seriously impair Columbia's ability to make favorable contracts with national advertisers. The affidavit of William S. Paley, President of Columbia, verified October 30, 1941 shows (R. 243-244) that national advertising efforts must be carefully and scientifically planned; that it sometimes requires months of market study and research, program planning and negotiations, before an advertiser decides whether to use network broadcasting at all or, if so, what stations and programs to utilize; that the national advertiser must have nation-wide coverage both because he sells nationally and because he must give substantially the same support to distributors and retailers in all parts of his territory; that under such circumstances it is practically impossible to sell an advertiser the use of networks, a program idea, program talent and the like, when the network is not able to know and inform the advertiser in advance what stations and what time the network has to offer, in short what circulation he would get for the money he would spend; that under the Commission's regulation with respect to option time the network might spend months of effort in convincing the sponsor, in helping him select the territory in which to broadcast his program, the stations to utilize, the character of the program and the talent, and then find itself un-

able to provide either the stations or the time desired by the advertiser in the markets which he desires to cover. Radio's chief competitors for the advertiser's dollar, such as the newspapers and magazines having national distribution, are able to assure advertisers of a definite circulation, and radio networks will be unable to meet their competition unless they are able to give advertisers corresponding assurance with respect to the circulation they can deliver (Paley affidavit, R. 231, 244). Under Regulation 3.104 it would be not only possible but probable that during the course of such a negotiation between Columbia and a national advertiser for, say, the hour between eight and nine on Monday evenings, one after another of the stations supposed to be on Columbia's network would disappear because that hour, or what would be just as bad some quarter or half hour within it, had been preempted by other networks. Obviously, the loss of even a few such stations, if they were strategically located to serve major markets which the advertiser desired to cover, would be enough to make the network no longer satisfactory to him.

Since the entire economic structure of radio broadcasting is based upon the sale of station time to advertisers (Paley affidavit, R. 225), impairment of the attractiveness of Columbia's network to national advertisers would lead to gradual disintegration of all its operations. Many of Columbia's most important activities are not directly revenue-producing. Its sustaining programs, which in 1940 cost it five million dollars (Paley affidavit, R. 230), bring it no direct income and are furnished to its affiliated stations without direct cost to them (*id.*, R. 224, 226). These include many of its most distinguished cultural programs such as the broadcasts of the New York Philharmonic-Symphony Orchestra, the Cincinnati Conservatory of Music, and other

programs of classical music, the Church of the Air, the School of the Air, broadcasts of special events of public importance, etc. (Affidavit of Frank Stanton, R. 319, 327-328), and many of the most important programs of news and news analysis (*id.*, R. 318-319; Paley affidavit, R. 230). Reliable studies show that radio broadcasts are more largely relied upon by the people as a source of news even than newspapers, especially in rural communities and smaller cities and towns (Stanton affidavit, R. 320-326).

Columbia's stability as a national network by virtue of its affiliation contracts, which give it a dependable relation with its stations and a reasonable continuity of affiliation, has enabled it to establish standards for various types of programs which at once serve the public interest and promote its own business interests by maintaining a character and reputation which contribute largely to its goodwill (audience) and its resultant ability to make advantageous sales of time to advertisers (Affidavit of Edward Klauber, R. 329). Some of these formulations of policy appear in the affidavits or exhibits thereto: Strict standards of suitability for commercial programs and of the products which they advertise (Paley affidavit, R. 230, and Ex. B thereto, R. 254-260); refusal to sell time for discussion of controversial public issues, except to political parties during campaigns, and the allotment, instead, of time impartially to spokesmen of opposing views on a non-commercial basis through sustaining programs (Klauber affidavit, R. 329-331); objective standards for broadcasts of news analysis (*id.*, R. 331-333), especially in war reporting (Exs. A and B to Klauber affidavit, R. 335-345); and insistence that religious broadcasts shall be widely representative of all faiths and shall never be commercial programs (Klauber affidavit, R. 333-334). Because of its strict adherence to high program standards, Columbia has

refused many million dollars of network business tendered to it in the last few years (Paley affidavit, R. 230).

It is apparent that Columbia is essentially a publication, addressing the ear rather than the eye, the nation-wide audience reached through its owned and affiliated stations corresponding to the circulation of a national magazine or the newspapers; and that its reputation for program material is as important to its business integrity and good-will as is the reputation of the contents of any printed periodical.

The Commission's regulations, prohibiting exclusive relations with affiliated stations and any option on their time which would be good against other networks, would, if enforced, inevitably endanger the integrity and usefulness of Columbia's network operations. In the first place, the loss of business from advertisers to competing advertising media such as newspapers, magazines and outdoor advertising, would so reduce its revenues that it could not afford to produce sustaining programs of the expensive and distinguished character that it has in the past. In the second place sacrifices of immediate revenue such as Columbia has hitherto made, either by withdrawing time from sale to make room for important public service and other sustaining programs or by rejecting sponsored programs deemed unsuitable under its standards, would be made at greatly increased peril. At present, because of its genuine option upon a part of the time of its affiliated stations, Columbia knows that when it makes such a sacrifice it is losing no more than the sale value of the particular time involved and can replace that with sufficient revenue-producing broadcasts to make a profit, provided the business is available and Columbia competitively able to get its share. But without such option, the remaining time, on which Columbia hitherto has been able to rely, might be preempted, period after

period, and station after station, by other networks and thus permanently lost. Finally, Columbia's financial returns, even from the eight stations owned or leased by it would be adversely affected. Each one of them is a part of Columbia's national network and derives an important part of its income from broadcasting network programs. Any impairment of Columbia's ability to obtain lucrative network commercial programs from advertisers, due to interference with its relations with its affiliated stations, would cause an immediate adverse reaction upon the eight stations which Columbia itself operates.

On the day following the verification of the complaint and the filing of this suit, the Commission passed its so-called "minute" of October 31, 1941. This appears in the affidavit of Telford Taylor, verified November 5, 1941, annexed the Government's motion to dismiss the complaint. This supervening minute furnished a major ground of the majority opinion in the court below and a copy of it is appended to that opinion. The minute reads (R. 453):

> "If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled

thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision."

We shall discuss fully in the argument the bearing of this minute upon the jurisdictional question. It is sufficient for the purpose of this statement to observe that by its terms the minute applies only to a station which "wishes to contest the validity of the Chain Broadcasting Regulations".

Prior to the allowance of this appeal the court below, on application of Columbia, made an order restraining the Commission until May 1, 1942, or the argument of the appeal, whichever is earlier, from enforcing the regulations issued in their amended form on October 11, 1942 (R. 482). In connection with the making of this order the District Court made findings of fact as follows (R. 481):

"I. That if the Federal Communications Commission, pending the plaintiff's appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; and if this court—contrary to its said judgment — has in fact jurisdiction over the cause of action stated in the complaint; the plaintiff will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two months or until the appeal can be argued, whichever is earlier, will not, so far as can be ascertained, involve injury to the public compensurate with the injury to the plaintiff arising from enforcement, if the conditions mentioned in the First Finding exist."

SPECIFICATION OF ERRORS

The District Court erred

1. In dismissing the complaint on the ground that the court had no jurisdiction over the subject matter of this suit;

2. In failing to find that it had jurisdiction to issue the injunction prayed for herein;

3. In failing to consider on the merits appellant's application for preliminary injunction.

ARGUMENT

The majority opinion in the court below held in effect that Subdivision (a) of Section 402 of the Communications Act of 1934 does not authorize a suit to set aside the order here involved because Congress intended that issues of the sort here raised should be reviewed only upon appeals to the Court of Appeals for the District of Columbia from the Commission's denial of renewals of licenses to individual stations, under the provisions of Subdivision (b) of Section 402. The full text of Section 402 is set forth in the appendix to this brief (*infra*, pp. 53-55).

As this Court said in *Federal Communications Commission* v. *Columbia Broadcasting System of California, Inc.*, 311 U. S. 132, the Act "bifurcates" permissible judicial review of action by the Commission. See also *Scripps-*

Howard Radio, Inc. v. *Federal Communications Commission*, No. 508, October Term, 1941, decided April 6, 1942, 10 U. S. Law Week 4322.

Section 402(a) authorizes "suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission", with stated exceptions, to be brought as provided in the Urgent Deficiencies Act. The stated exceptions are orders "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license". As to these five excepted classes, Section 402(b) authorizes appeals from decisions of the Commission to the Court of Appeals of the District of Columbia under procedure set forth in subdivisions (c) (d) (e) and (f) of Section 402.

The majority does not hold that the order here involved is one of those excepted in subdivision (a) and specified in subdivision (b). Manifestly it could not so hold. Its theory is rather that the questions presented in this litigation as to the legality of the order are of the same sort as would be involved upon an appeal to the Court of Appeals of the District of Columbia under Section 402(b) from action of the Commission denying renewal of a license to an individual station on the ground that it had violated the regulations promulgated by the order; and therefore Congress must be deemed to have intended that such an appeal be the sole remedy of anyone aggrieved by the Commission's order.

The majority opinion expresses doubt (R. 460) whether the Commission's order here involved would, even apart from the supposed legislative intention which it derives from Section 402(b), be the sort of order which would be reviewable under Section 402(a). But it expressly refrains

from deciding that question. It suggests (R. 460) that, if the order be not of the sort reviewable under 402(a), Columbia may have a remedy through another sort of suit under the general equitable jurisdiction. But, it does not decide that such a suit would lie. It dismisses as irrelevant Columbia's allegations that there is no assurance that any of its affiliated stations would challenge the regulations, holding that, whether or not any affiliated station elected to contest, Columbia would have an opportunity and a standing to intervene before the Commission on applications by stations for renewal of licenses and to appeal from "any order imposing unlawful conditions upon an 'affiliate's' license", and that this is "an adequate remedy under sec. 402 itself" (R. 462).

In the ensuing points we shall show, first, that the grounds upon which the majority rested its decision below are untenable, and, second, that this suit is properly brought under Section 402(a).

FIRST: THE COMMUNICATIONS ACT OF 1934 CONTAINS NO WARRANT FOR RELEGATING COLUMBIA TO INTERVENTION BEFORE THE COMMISSION UPON APPLICATIONS OF INDIVIDUAL STATIONS FOR RENEWAL OF THEIR LICENSES, AND APPEALS TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA UNDER SECTION 402(b) FROM THE COMMISSION'S ACTION THEREON.

(a) The Act discloses no legislative intention to exclude the order here involved from review under Section 402(a).

Subdivision (a) of Section 402 is the inclusive provision for review. It authorizes broadly "suits to enforce, enjoin, set aside, annul, or suspend *any** order of the Com-

*All italics in quotations in this brief are supplied unless otherwise noted.

mission", except the five classes particularly specified in the parenthetical exception. Except for them it states no limitation. Nor does the Urgent Deficiencies Act state any limitation. Its provisions, in so far as they are pertinent here, merely prescribe the procedure to be followed in the suit. It is well settled by authorities in this Court under the Urgent Deficiencies Act that review thereby provided is normally available to a person injured by an order of an administrative body, to which its procedure is made applicable, although the order relates to the conduct of others. *The Chicago Junction Case,* 264 U. S. 258; *Assigned Car Cases,* 274 U. S. 564. The language describing the five classes of proceedings excepted in Section 402(a) is to be construed according to its natural meaning and not extended by implication (*Federal Communications Commission* v. *Columbia Broadcasting System of California, Inc.,* 311 U. S. 132, *supra*).

The majority opinion below based its conclusion as to the presumed intention of Congress upon the assumption that the questions relating to the validity of the Commission's order as presented in this suit are the same as those which would be involved on an application by an individual station for renewal of its license, review of the denial of which would be under Section 402(b). It said (R. 461):

> "* * * Hence, if these actions well lie, the plaintiffs have succeeded in substituting a different court and a different procedure from that which Congress has prescribed for the trial of precisely the same issues. This is inexorably true because here the only question is whether the Commission has power to impose the conditions mentioned in the regulations when a 'station' applies for renewal; exactly the question which will determine the actual renewal of a license."

But even if the supposed similarity, or even identity, of issues in fact obtained, that is not enough. It is the type of proceeding, and not the character of the questions involved therein, which governs.

As the majority below recognizes (R. 461-2), the issues here presented, insofar as they relate to individual stations, might be raised either by an application for renewal of license by a station under Sections 307, 308 and 309, or by a revocation of the station's license by the Commission under Section 312(a). If the right to revoke the license were asserted on the ground that the station persisted in maintaining its existing affiliation contract with Columbia, the questions presented with respect to the Commission's order would be identical with those which would be involved if the Commission denied the station's application for renewal of its license upon the sole ground that it had not abrogated its affiliation contract. But, under Section 402, review of the order of revocation in the former case would be by a three-judge district court under the Urgent Deficiencies Act as provided by subdivision (a), whereas a review of the order denying the renewal of the license in the latter case would be by the Court of Appeals of the District of Columbia under subdivision (b). *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* No. 508, October Term, 1941, *supra.* This was conceded by the Government in its brief below.

The extent of the misapprehension of the majority below with respect to the intention of Congress in providing the "bifurcation" of review procedures embodied in Section 402 is strikingly revealed by the passage in its opinion which discusses the revocation possibility. Following the passage from which we have above quoted, regarding the "anomalous result" which the majority supposed would follow from

permitting the same questions which would arise upon a license renewal application to be presented in a suit to review the Commission's order under Section 402(a), the majority said (R. 461-2):

> "To this the plaintiffs make two answers. First, they say that the threat itself has already caused them loss, as we have said. Possibly that might support an action to compel the Commission to raise the issues immediately, as by a revocation proceeding under sec. 312(a); *even so, it should not substitute another court for the Commission and the Court of Appeals, certainly not this court in an action against the United States and the Commission.*"

The majority's conclusion, which we have italicized in the above quotation, is patently incorrect.

In the *Scripps-Howard Radio, Inc.* case, *supra*, this Court said that

> "* * * if the Commission on its own motion modifies a station license, review is had under § 402(a) in the appropriate district court. However, if it grants an application for modification of a license, an appeal lies under § 402(b) to the Court of Appeals for the District of Columbia. *Both cases give rise to the same kind of issues on appeal.*"

Certainly also a ruling on an application for consent to the transfer of a station license presents issues under the test of "public convenience, interest and necessity" which would be in most cases very similar, and in many cases identical, with those which would be involved if the proposed transferee, instead of seeking a transfer of the license of another, made an application for a new construction permit or license to itself. But this Court held in *Fed-*

eral Communications Commission v. *Columbia Broadcasting System of California, Inc.*, 311 U. S. 132, *supra*, that review of such a ruling under Section 402(b) would not lie.

It follows, therefore, that the fundamental hypothesis upon which the majority below predicated its theory of the presumed intention of Congress to make the procedure provided in Section 402(b) the sole remedy of any suitor, whose case involves questions of a character which might be raised in proceedings of the five classes contained in the parenthetical exception to Section 402(a), is wholly without foundation. Its assumptions are flatly contradicted by opinions of this Court.

(b) The suggested substitute procedure of intervention on particular license applications, and appeal under Section 402(b), is either unavailable to Columbia or inadequate.

(1) *The suggested substitute procedure is completely unavailable to Columbia if its affiliated stations fail to contest the Commission's order but submit to its requirements.*

To take advantage of the procedure suggested in the majority opinion, Columbia would have to wait at least until an application for renewal of license were presented to the Commission by one of its affiliated stations. The suggested procedure would then be that Columbia would attempt to intervene before the Commission and, if renewal were denied, appeal to the Court of Appeals of the District of Columbia from the resulting order. Passing all the difficulties, which we shall describe in the next subdivision, of this procedure even if the station contests the Commission's order, we proceed to examine the position of Columbia in case the station does not contest. The majority below dismisses this possibility as irrelevant (R. 462), but obviously it is not.

If the station elected not to contest, but to submit to the requirements of the order, it could simply file with the Commission a declaration, or otherwise notify it, that it had abrogated all of the provisions of its affiliation contract denounced by the Commission's regulations, and that it would in the future govern its conduct according to their requirements; that it would accept programs from any network organization, would give Columbia no option on its station time which would prevent its sale thereof to any other network, and would reserve the right to reject any program offered it by Columbia under the conditions specified by the Commission.*

The Commission could be expected to treat a station which notified it that it had abrogated the provisions of its affiliation contract which the regulations proscribe, and would conduct its operations accordingly, as sufficiently complying with the order. The Commission would be interested in the conduct of the station, not its legal justification therefor as against Columbia. The latter question it would leave to Columbia to fight out with its stations if so advised. It would therefore renew the license. This would

---

*It is idle to debate the question whether, as a matter of legal right, the station would be entitled thus unilaterally to abrogate or amend its affiliation contract. The majority opinion below (R. 461) says that, until the Commission imposes the conditions embodied in its regulations, "no change is made in the status of the 'affiliates' meanwhile; their existing contracts with the 'network' remain enforceable * * *." But, however legally unjustified repudiation by a station of its affiliation contract might be, it is difficult to see what as a practical matter Columbia could do to force its affiliates either to perform or contest. Separate suits against 115 affiliated stations in nearly as many separate jurisdictions would scarcely be an efficacious course. Even assuming that all would be successful, there could be no assurance of interlocutory relief which alone would protect Columbia's network against disintegrating during the time when this multiplicity of suits was in process of litigation.

be, from the point of view of the Commission, an entirely safe procedure since, if the station's subsequent conduct did not square with the declaration of intention on which it had secured renewal, the Commission could proceed to revoke its license under Section 312(a).

In these circumstances it is difficult to see how there would be any proceeding in the Commission in which Columbia could intervene, or any order which could be the subject of an appeal by Columbia to the Court of Appeals of the District of Columbia. The majority below assumes that *any* action upon an application for renewal would involve an application of the regulations which Columbia could review on appeal. But the terms of the Act give no such assurance. Under Section 309(a), "If upon examination of any application * * * for the renewal * * * of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the * * * renewal * * * thereof in accordance with said finding"; and it is only "In the event the Commission * * * does not reach such decision", that it is required to set the application for hearing. Thus, if the Commission concluded that a station has complied with its regulations, it could simply find that "public interest, convenience or necessity" would be served by the renewal of its license and renew the same without formality. The station's license would have been neither denied nor modified. The Commission would urge with force that there had been no imposition of unlawful conditions as the majority below supposed (R. 462), and that what had damaged Columbia was not action by the Commission, but action by the station. Upon what, then, would Columbia predicate an appeal to the Court of Appeals of the District of Columbia?

The Commission's minute of October 31, 1941 is wholly ineffective to protect Columbia from that situation. It provides that *"If a station wishes to contest the validity"* of the regulations, "its license will be set for hearing", and there follow provisions insuring that the station in that event may remain on the air, pending such contest and appeal from the Commission's decision, through temporary extensions of the license from time to time until there has been a final determination of the issues. This of course has no application if the station does not contest.

The facts set forth in the Statement (*supra*, p. 16) show that, even if only a few of Columbia's affiliated stations located in strategic communities elected to comply with the Commission's regulations, Columbia's integrity as a network would be irreparably disrupted. We submit that the complaint sufficiently alleges (R. 11-12) that no station will contest. The majority below decided the case on that hypothesis (R. 462), though saying that it seems little "likely to be the case". But the latter assumption is unwarranted. There are many reasons why stations generally would be unwilling to contest. One reason would be reluctance to assume the burden of hearings before the Commission and subsequent litigation in the Court of Appeals of the District of Columbia, both of which are in Washington and far distant from the localities in which many of these stations operate. But another and perhaps more powerful deterrent would be the reluctance of the station to incur the displeasure of the Commission to which it is continuously a suppliant in matters essential to its operations and on which indeed it is dependent for its economic welfare and often indeed for its very life.*

*Mr. Paley's affidavit, filed subsequent to the decision below, on the motion for stay, stated that he knew of no station which was prepared to contest (R. 476).

(2) *Even if a station does contest, the suggested substitute procedure is wholly inadequate.*

Any proceedings before the Commission on the application for renewal of license, and any appeal under Section 402(b) from the Commission's action thereon, would affect only the particular station whose license was involved. Meanwhile the Commission's regulations would become effective as to the contracts of all other stations. Even though, under this Court's decision in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* No. 508, October Term, 1941, *supra,* a stay might be obtained from the Court of Appeals of the District of Columbia with respect to the particular station, there would be no effective vehicle for suspending the effect of the order on the other stations, and accordingly no way of protecting Columbia from the injury which we have described in the Statement. The practical certainty that a large proportion, at least, of the stations would not contest at all, would cause Columbia's network to disintegrate before the question of the power of the Commission to make the order could be judicially determined. One of the findings of fact made by the court below on the granting of the stay (*supra,* p. 20) was (R. 481):

> "II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity."

In addition, there is no assurance that if a station contested the proposed denial of its station license the decision of the Commission would be based upon a ground which necessarily involved the validity of the regulations. To provide a clear-cut test of that issue, the station would have to be one to which no objection other than its non-

compliance with the Commission's regulations could possibly be made under the test of "public interest, convenience or necessity".

Assuming, however, that a case is presented on the part of a station which desires to contest and whose right to a renewal, apart from the provisions of its affiliation contract, is clear, there is no assurance that Columbia would be permitted to intervene in the hearing on the application for renewal. The majority below recognize (R. 462) that the Act does not in terms provide that Columbia may be heard in the proceeding before the Commission under Section 309(a), but it says that Section 1.102 of the Commission's Rules permits intervention. We set forth this rule in the margin.* Plainly, the phraseology of this rule might be construed to leave avenues of escape for a commission which did not desire to permit an effective intervention. And the Commission itself in one of its decisions (*In re Application of Hazelwood, Inc., Orlando, Florida*, Docket No. 5698, decided Sept. 29, 1939, as quoted in *In re Matheson Radio Co., Inc.*, 2 Pike and Fischer Admin. Law, 41g.23-1,-3, footnote 4), said:

> "The fact that a proposed intervenor may have the right to contest in a court the validity of an

---

*"§ 1.102 Intervention.—Petitions for intervention must set forth the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, the facts on which the petitioner bases his claim *that his intervention will be in the public interest*, and must be subscribed or verified in accordance with section 1.122. The granting of a petition to intervene shall have the effect of permitting intervention before the Commission but shall not be considered as any recognition of any legal or equitable right or interest in the proceeding. The granting of such position *shall not have the effect of changing or enlarging the issues* which shall be those specified in the Commission's notice of hearing *unless on motion the Commission shall amend the same.*"

order granting or denying a particular application does not in and of itself mean that such person is entitled as a matter of right to be made a party to the proceedings before the Commission on such application."

The majority opinion below says (R. 462) that

"An unreasonable refusal of the privilege [of intervention] so offered [by Regulation 1.102] would appear to be a good objection on appeal under sec. 402 (b) (2); for it is not likely that the statute which grants an appeal to all interested parties, meant not to give them the opportunity to make a record on which they can succeed upon that appeal."

But there can be no such assurance. This Court, in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, in discussing the authority of the Commission under the Communications Act of 1934, said (p. 138):

"* * * Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, *whether parties should be allowed to intervene in one another's proceedings,* and similar questions *—were explicitly and by implication left to the Commission's own devising,* so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest."

Again the Commission's minute of October 31, 1941 is of no assistance to Columbia. By its express terms it is

intended only to provide relief for a *station* which wishes to contest the regulations. It contains nothing which gives any assurance to the *networks* of an opportunity to intervene and make a record which would present to the Court of Appeals of the District of Columbia in satisfactory form the question of the validity of the regulations. And neither the minute nor the statute provides any means whereby Columbia might preserve the *status quo* pending the determination of the validity of the Commission's order.

(c) Proceedings on the application of an individual station for renewal of its license do not afford an appropriate review of the Commission's order here in question.

The review of the Commission's order should correspond with the scope of objective of the Commission in making it. That objective was to promulgate general all-embracing regulations designed to eliminate provisions in contracts between stations and network organizations which the Commission regarded as probably infringing the anti-trust laws or at any rate unduly restrictive of competition. They apply indiscriminately to every station having contracts containing such provisions.

Manifestly, proceedings upon applications of particular stations for renewal of their licenses do not afford, either in substance or even in form, a review ~~of that~~ order. Appeal to the Court of Appeals of the District of Columbia under Section 402(b) could not be a review of the order promulgating those regulations. It would be a review of another order, denying renewal of a station license, in which the question of the validity of the order promulgating the regulations would be involved only as indicating the ground on which the order refusing the license renewal had been predicated.

No review under Section 402(b) could possibly involve a comprehensive consideration of the total effect of the order. The question is of the authority of the Commission to enforce, through regulations of this character, its views as to the promotion of competition among networks and stations. The order should be reviewed as a whole. This can be done only in a suit like the present one under Section 402(a). It cannot be done under the substitute procedure under Section 402(b) suggested by the majority below.

SECOND: THE REQUIREMENTS FOR A SUIT UNDER THE URGENT DEFICIENCIES ACT, MADE APPLICABLE BY SECTION 402(a) OF THE COMMUNICATIONS ACT OF 1934, ARE SATISFIED IN THIS CASE.

In a suit under the Urgent Deficiencies Act "the district court sits as a court of equity" (*United States* v. *Morgan,* 307 U. S. 183, 191); and the plaintiff invokes "the court's equity powers" (*Inland Steel Co.* v. *United States,* 306 U. S. 153, 156). "The proceeding in the court is not an appeal; it is a plenary suit in equity" (*F. H. Peavey & Co.* v. *Union Pacific Railroad Co.,* 176 Fed. 409, 417 (C. C., W. D. Mo.), modified and affirmed *sub nomine Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42).

The opinion of this Court in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, involving action by the Federal Communications Commission, indicates that Section 402(a) provides for court review under the provisions of the Urgent Deficiencies Act if (1) there is a "case" or "controversy" under Article III, Section 2, of the Constitution, (2) the conventional requisites of equity jurisdiction are satisfied, and (3) there is an "order" within the meaning of the Act.

There can be no question that this case satisfies the constitutional requirements of "case" or "controversy". *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125; *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156. That it also satisfies the other two requirements necessary to establish jurisdiction in the District Court is shown in the following argument.

(a) This case satisfies the conventional requisites of equity jurisdiction.

(1) *Columbia has standing to sue.*

The complaint shows that the order invades and will continue to invade legal rights of Columbia in the form of property rights, contract rights and the right to freedom of contract. Although it is directed at stations, the order injures Columbia as a network organization.

That legislative or administrative action which thus interferes with an existing or potential contract or business relationship may be challenged by one of the parties thereto, even where the offending act or order purports to be directed only at the rights of the other party, is shown by numerous analogous cases.

In *Truax* v. *Raich*, 239 U. S. 33, a native of Austria was held to have standing to sue to enjoin enforcement of a state statute requiring his employer to employ at least 80% qualified electors or native-born citizens. His employer had informed him that on the effective date of the statute he would be discharged solely because of the statute. This Court said (pp. 38-39):

> "* * * The employé has manifest interest in the freedom of the employer to exercise his judgment with-

> out illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will. * * * It is further urged that the complainant cannot sue save to redress his own grievance (*McCabe* v. *Atchison, Topeka & Santa Fe Ry.*, 235 U. S. 151, 162); that is, that the servant cannot complain for the master, and that it is the master who is subject to prosecution, and not the complainant. But the act undertakes to operate directly upon the employment of aliens and if enforced would compel the employer to discharge a sufficient number of his employés to bring the alien quota within the prescribed limit."

In *Pierce* v. *Society of Sisters*, 268 U. S. 510, it was held that a corporation conducting private schools had standing to sue to enjoin enforcement of a state statute which required parents of children of certain ages to send them to public schools. The plaintiff showed that the successful conduct of its business required long-term contracts with parents and that the act was causing and would cause withdrawal from the plaintiff's schools of children who would otherwise continue to attend them. This Court said (pp. 535-536):

> "Generally it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the State upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any *proper* power. Plaintiffs asked protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule ap-

proved in *Truax* v. *Raich, Truax* v. *Corrigan* and *Terrace* v. *Thompson, supra,* and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers." (Italics in original.)

In *United States* v. *Village of Hubbard,* 266 U. S. 474, a municipality sued under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission requiring increases of intrastate interurban passenger fares on electric railroads. The district court set aside the order. This Court reversed the decree of the district court on the merits without discussion of the standing of the municipality to sue. This was discussed, however, in the later case of *Alexander Sprunt & Son, Inc.* v. *United States,* 281 U. S. 249, this Court distinguishing the *Village of Hubbard* case as one involving "an independent legal right of the plaintiff", pointing out that the challenged order "was alleged to violate a contract between the plaintiff and the carrier" (p. 257).

For additional cases, several of which arose under the Urgent Deficiencies Act, showing that the injury complained of by Columbia is such as to give it standing to maintain this suit, including cases in which the injury complained of resulted from interference by unauthorized government action with *potential* contracts or business relationships instead of with existing contracts, see: *Claiborne-Annapolis Ferry Co.* v. *United States,* 285 U. S. 382; *Terrace* v. *Thompson,* 263 U. S. 197; *Pennsylvania* v. *West Virginia,* 262 U. S. 553; *The Chicago Junction Case,* 264 U. S. 258; *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557; *Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42; *A. E. Staley Mfg. Co.* v. *Secretary of Agriculture,* 120 F. (2d) 258 (C. C. A., 7th Circ.). In *Terrace* v. *Thomp-*

son, supra, where it was held that an owner of land who proposed to lease it to an alien could sue to enjoin enforcement of a state Alien Land Law which provided that an alien should not take or hold land, this Court said (pp. 215-216):

> "* * * If, as claimed, the state act is repugnant to the due process and equal protection clauses of the Fourteenth Amendment, then its enforcement will deprive the owners of their right to lease their land to Nakatsuka, and deprive him of his right to pursue the occupation of farmer, and the threat to enforce it constitutes a continuing unlawful restriction upon and infringement of the rights of appellants, as to which they have no remedy at law which is as practical, efficient or adequate as the remedy in equity. And assuming, as suggested by the Attorney General, that after the making of the lease the validity of the law might be determined in proceedings to declare a forfeiture of the property to the State or in criminal proceedings to punish the owners, it does not follow that they may not appeal to equity for relief. * * * The owners have an interest in the freedom of the alien, and he has an interest in their freedom, to make the lease. The state act purports to operate directly upon the consummation of the proposed transaction between them, and the threat and purpose of the Attorney General to enforce the punishments and forfeiture prescribed prevent each from dealing with the other. *Truax* v. *Raich, supra.*"

(2) *The suit is not premature.*

Columbia's application for preventive relief is not premature by reason of the fact that the "effective date" of the regulations with respect to "existing contracts, arrangements, or understandings, or network organization station

licenses" was deferred by the Commission to a date after the date of the commencement of this suit (R. 33-34). In *Pierce* v. *Society of Sisters*, 268 U. S. 510 (*supra*, p. 37), where the challenged statute was not to become effective until a date more than a year after the case was finally decided, this Court said (p. 536):

> "The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity."

See also the opinion of the district court, 296 Fed. 928, 933-935 (D. C., D. Ore.). In *Pennsylvania* v. *West Virginia*, 262 U. S. 553, where it was held that Pennsylvania could sue to enjoin enforcement of a statute of West Virginia requiring producers of gas to satisfy the needs of West Virginia customers in preference to those of other customers, this Court said (pp. 592-593):

> "The second question is whether the suits were brought prematurely. They were brought a few days after the West Virginia act went into force. No order under it had been made by the Public Service Commission; nor had it been tested in actual practice. But this does not prove that the suits were premature. Of course they were not so, if it otherwise appeared that the act certainly would operate as the complainant States apprehended it would. One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough."

In *United States* v. *Abilene & Southern Railway Co.*, 265 U. S. 274, enforcement of an order of the Interstate Com-

merce Commission was enjoined in a suit under the Urgent Deficiencies Act commenced before the effective date of the order. See also *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 287-288; *Terrace* v. *Thompson*, 263 U. S. 197, 215-216; *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 386; *City Bank Farmers Trust Co.* v. *Schnader*, 291 U. S. 24, 34.

Nor is Columbia's application for preventive relief premature by reason of the fact that the government action complained of was the promulgation of regulations involving the denial of licenses in the future. In *Waite* v. *Macy*, 246 U. S. 606, importers of tea sued to enjoin a board of assessors from applying to tea imported by the plaintiffs a regulation promulgated by the Secretary of the Treasury. The statute provided that, if the plaintiffs' tea were entered in the customs house and excluded under the regulation, the plaintiffs could have the matter reexamined by the board. Instead of waiting to have the tea examined, the plaintiffs resorted directly to the courts. This Court held that they were entitled to do so. In *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, an owner of unimproved land sued to enjoin the Village from enforcing a zoning ordinance on the ground that because of certain restrictions imposed by it the ordinance operated to reduce the market value of his land. This Court held that the suit was not premature, saying (p. 386):

> "A motion was made in the court below to dismiss the bill on the ground that, because complainant [appellee] had made no effort to obtain a building permit or apply to the zoning board of appeals for relief as it might have done under the terms of the ordinance, the suit was premature. The motion was properly overruled. The effect of the allegations of the bill is that the ordinance of its own force

operates greatly to reduce the value of appellee's lands and destroy their marketability for industrial, commercial and residential uses; and the attack is directed, not against any specific provision or provisions, but against the ordinance as an entirety. Assuming the premises, the existence and maintenance of the ordinance, in effect, constitutes a present invasion of appellee's property rights and a threat to continue it. Under these circumstances, the equitable jurisdiction is clear. See *Terrace* v. *Thompson*, 263 U. S. 197, 215; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535."

(b) The order complained of is an "order" within the meaning of the Act.

Respondents argued below that the order complained of is not reviewable because the regulations amount merely to an expression of a general policy regarding the granting of station licenses, which might rest in a deliberative stage until applied on specific applications, and do not constitute the Commission's ultimate determination on any issue. This argument is manifestly inconsistent with the nature and form of the order, the character of the proceeding in which it was made, the Commission's own construction of the order, and the obvious intention of the Commission with respect to the application of the regulations.

The order is legislative in character, and was made as the final act in a proceeding instituted in aid of the Commission's rule-making power. The Commission's order No. 37, instituting the proceeding, specifically bases it on the Commission's power under Section 303 (i) "to make special regulations applicable to radio stations engaged in chain broadcasting". The order enacts that "no license shall be granted" to a station having an affiliation contract containing any of the proscribed provisions, and the Com-

mission in its Report justifies such legislation on the ground that "The formulation of a regulation in general terms is an important aid to *consistency* and *predictability*" (R. 141).

The immediateness of the effect of the regulations is recognized by the Commission itself by the provisions of the original order and the amending order postponing their "effective date" with respect to "existing contracts, arrangements, or understandings, or network organization station licenses", and similarly providing for the postponement of the "effective date" of Regulation 3.106 "in order to permit the orderly disposition of property", and by the meticulousness with which since the dates of those orders the "effective dates" have been further postponed from time to time (*supra*, pp. 11-12).

The order is not an "interim step" (*Rochester Telephone Corp. v. United States*, 307 U. S. 125, 131) in any proceeding. It completed the proceeding in which it was made. It is no more an interim step in licensing proceedings than is any of the sections of the Communications Act of 1934 which state the grounds upon which licenses may be granted or denied. The order obviously does constitute the Commission's ultimate determination. The regulations which it promulgates lay down the conditions with which an applicant must comply to obtain a license. It is perfectly plain that the Commission does not intend to reexamine any of them in any important respect.

Respondents also argued below that the order complained of is not reviewable because it does not compel conduct on the part of anyone and has no present effect. Assuming for the present, *arguendo*, that this is necessary to the reviewability of an order made under the rule-making power, this order does compel conduct and is presently effec-

tive. It in effect commands and compels affiliates to free themselves from their affiliation contracts with Columbia as a condition precedent to renewal of their licenses. The affidavits of Herbert V. Akerberg show that the order has had and is continuing to have *de facto* effect in that direction even though because of successive suspensions it has not become effective *de jure* (R. 263, 309). The acts and statements of the Commission show that the order was intended to have just this effect. The Opinion on Rehearing contains statements to the effect that the regulations "prohibit" certain things (R. 24, 25, 28).

In its brief below (p. 11, footnote) the Commission said:

> "In the event that the Chain Broadcasting Regulations are not complied with, the Commission could proceed against licensees either by revocation hearings or by setting their licenses down for hearing on renewal. As indicated in the Commission's Minute of October 31, 1941, the latter procedure will be followed."

As to revocation, Section 312(a) of the Act provides that "Any station license may be revoked * * * for violation of or failure to observe any of the restrictions and conditions of this Act *or of any regulation of the Commission authorized by this Act*". The fact that the Commission treats failure to observe its regulations as cause for revocation of licenses shows that in the Commission's view the regulations are self-executing and presently operative. It makes no difference whether it presently intends to avail itself of that remedy or not.

The form in which the Commission at first proposed to couch its regulations is highly significant. Most of the proposed regulations set forth in the Commission's notice of

November 28, 1940 (Ex. F to Complaint; R. 43-46), which ordered argument on such regulations, began with the express prohibition, "No licensee of a standard broadcast station *shall enter into* any contractual relation, express or implied, with a network organization which" etc. It could hardly be argued that an order promulgating regulations embodying such direct prohibitions would not be a reviewable "order". But it is the height of unreality to distinguish between that language, in the regulations as proposed, and the language finally adopted that "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which" etc. The difference is purely verbal. In all substantial respects the effect is the same. Compulsion is inescapable. Stations have no choice. They must comply or lose their licenses. Networks have no choice. They must have station outlets, either their present affiliates or some others. But neither present nor new affiliates can stay on the air if they have contracts containing the forbidden provisions.

On the question of jurisdiction under the Urgent Deficiencies Act it is the substance, and not the form, which governs.

In *Powell* v. *United States,* 300 U. S. 276, where such jurisdiction was upheld to review an order of the Interstate Commerce Commission that a certain tariff filed by a railroad be stricken from the Commission's files, this Court said (pp. 284-285):

> "The United States and the Interstate Commerce Commission contend that the commission's order is not reviewable under the statute. They do not suggest that the order is a negative one or that the commission did not make an utterance which in form purported to be an order. But they say that

it is not directed to any party; it requires no one to do or to refrain from doing any act; it could not be enforced, obeyed or disobeyed; it did not speak to the future or contemplate any future effect because, on and after the date it was made, it had no significance 'except as a record of a certain completed act performed by the Commission.'

But overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect. By it the commission meant to put an end to the tariff in question and the service of the Seaboard according to its terms."

In *American Federation of Labor* v. *National Labor Relations Board,* 308 U. S. 401, where it was held that a certification by the National Labor Relations Board of a bargaining representative of employees under Section 9(c) of the National Labor Relations Act was not a "final order" reviewable under Section 10(f) of the Act, this Court said (p. 408):

"In analyzing the provisions of the statute in order to ascertain its true meaning, we attribute little importance to the fact that the certification does not itself command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be reexamined by courts under particular statutes providing for the review of 'orders.' See *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 130, 135, *et seq.; Federal Power Comm'n* v. *Pacific Power & Light Co.,* 307 U. S. 156."

On this question of form and substance, the Commission faces both ways according to the exigencies of its effort to escape review. To support its contention that the Commission's action was nothing more than a declaration of inten-

tion, which did not require an order but which could as well have been promulgated by public announcement or even a press release, it urges that the plain fact that its action was taken by the making of an "order" be disregarded as a mere matter of form. But in combating our argument that the regulations promulgated by the order have immediate effect, it insists that substance be disregarded and the form of language used be exalted as the controlling consideration.

There is ample precedent for holding that the order promulgating regulations of this sort is a reviewable "order".

In *American Telephone & Telegraph Co.* v. *United States*, 14 F. Supp. 121 (D. C., S. D. N. Y.), aff'd 299 U. S. 232, numerous telephone companies brought suit under the Urgent Deficiencies Act to set aside an order of the Federal Communications Commission, made under its rule-making power, prescribing generally a uniform system of accounts for telephone companies, under Section 220(a) of the Communications Act of 1934 which provides that "The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers". Such an order is, for jurisdictional purposes, fairly analogous to that here involved which purports to be based in part at least on Section 303(i). The case was heard and determined on the merits, the decision sustaining some of the plaintiffs' objections to the order and overruling others. It was affirmed by this Court on the merits.

In a number of cases where suits were brought under the Urgent Deficiencies Act to review orders of the Interstate Commerce Commission promulgating rules and regulations, this Court has rendered decisions on the merits without questioning the propriety of the lower courts' exercise of jurisdiction. *United States* v. *Baltimore &*

Ohio Railroad Co., 293 U. S. 454 (order of Interstate Commerce Commission amending general rules previously promulgated by Commission so as to prescribe power-operated reverse gears for all steam locomotives); *Chicago, R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80 (order of Interstate Commerce Commission prescribing general rules regulating car hire settlements); *Assigned Car Cases*, 274 U. S. 564 (order of Interstate Commerce Commission establishing a general rule of coal car distribution). Like jurisdiction has been exercised to review decisions of the Commerce Court. *Kansas City So. Ry. Co.* v. *United States*, 231 U. S. 423 and *Interstate Commerce Commission* v. *Goodrich Transit Company*, 224 U. S. 194 (regulations of Interstate Commerce Commission prescribing methods of bookkeeping for carriers).

In *Lambert Run Coal Company* v. *Baltimore & Ohio Railroad Co.*, 258 U. S. 377, this Court affirmed the dismissal of a suit by a coal company against a railroad company brought under general equity jurisdiction to enjoin the latter from applying certain rules of coal car distribution which had been promulgated by the Interstate Commerce Commission, upon the express ground that the suit was in substance one to set aside an order of the Commission and therefore should have been brought against the United States under the Urgent Deficiencies Act. Accord, *Corona Coal Co.* v. *Southern Railway Co.*, 260 U. S. 698, aff'g 266 Fed. 726.

In *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, a telephone company sued under the Urgent Deficiencies Act, as made applicable by Section 402(a) of the Communications Act of 1934, to set aside an order of the Communications Commission which classified the company as one subject to all common carrier provisions of the Act and, therefore, subject to all orders of the Telephone

Division of the Commission, instead of classifying it as a connecting carrier within an exception in the Act. Although this Court affirmed on the merits a decree dismissing the complaint, it expressly held that the order was reviewable under the Urgent Deficiencies Act, overruling a contrary contention made under the previously-held doctrine with respect to "negative orders." This Court's opinion classified (pp. 129-30) the prior decisions denying review under the "negative order" doctrine into three categories, explained the reasons for previous denials of review in each category, and concluded (p. 143) that "any distinction, as such, between 'negative' and 'affirmative' orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding".

The importance of the *Rochester* case is not that the order here in question could conceivably be construed as a "negative" one even under this Court's previous authorities. It is rather in the implications inherent in the Court's elucidation of the true grounds upon which many of the Court's decisions which seemed to involve the discarded doctrine actually rested. In the instant case the Commission erroneously contended in the court below (Brief, p. 14) that the regulations "clearly fall into the group of cases" referred to by this Court in the first category described in the opinion where "the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action" (307 U. S., p. 130). This Court said (p. 131) that denial of judicial review in these cases rests either upon an absence of the constitutional requirement of a "case" or "controversy" or upon the "procedural philosophy" whereby "Congress has been loath to

authorize review of *interim steps* in a proceeding." But we have already shown that the present order was in no sense an "interim step", and that there is unquestionably a "case" or "controversy". We have also shown that the order adversely affects Columbia now.

Each of the cases referred to by this Court in its opinion in the *Rochester* case (307 U. S., p. 130) as examples of cases under the Urgent Deficiencies Act involving orders which are not reviewable because the complainant's rights are adversely affected only "on the contingency of future administrative action" is distinguishable from the present case.

United States v. *Los Angeles & Salt Lake Railroad Co.*, 273 U. S. 299, involved a determination by the Interstate Commerce Commission of the "final value" of the railroad's property under the Valuation Act. This Court pointed out: (1) (p. 309) that the orders which had previously been held subject to review had been "an exercise either of the quasi-judicial function of determining controversies or of the delegated legislative function of rate making and *rule making*"; (2) (pp. 309-310) that the "so-called order" did not "determine any right or obligation"; and (3) (p. 310) that it was "merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission", and "is the exercise solely of the function of investigation." The order in the present case, on the other hand, purports to be made under the Commission's rule-making power, and is formal action which destroys rights and property.

Shannahan v. *United States*, 303 U. S. 596, involved merely a finding of the Interstate Commerce Commission to the effect that a railway was not "a street, interurban or suburban electric railway" within the meaning of the exemption provided by Section 1 of the Railway Labor Act. No

order was entered by the Commission on the finding. This Court said (p. 599):

> "The function of the Commission is limited to the determination of a fact. Its decision is not even in form an order. It 'had no characteristic of an order, affirmative or negative.'"

Obviously this could not be said about the order in the present case. This Court further pointed out (pp. 599, 600) that the determination was not enforceable by the Commission and was not even enforceable by the National Mediation Board by which it was sought; and that the determination did not command or direct anything to be done. The order in the present case, however, is self-executing in its interference with valid contractual relations, and is one which, if valid, is enforceable and will be enforced by the Commission itself.

Delaware & Hudson Co. v. *United States,* 266 U. S. 438, involved a determination by the Interstate Commerce Commission of a "tentative valuation" of the railroad's property. Section 19a of the Interstate Commerce Act provided that upon "notice of protest" by the railroad of the "tentative valuation" the Commission should hold a hearing thereon and "make such changes as may be necessary" before issuing a final valuation. The railroad had filed a notice of protest but commenced its suit under the Urgent Deficiencies Act before the Commission had acted thereon. Thus the determination complained of did not constitute the final determination of the proceeding before the Commission. Here the order complained of was legislative in character and terminated the investigation which preceded it.

United States v. *Illinois Cent. R. R. Co.,* 244 U. S. 82, is sufficiently distinguished by the following language in this Court's opinion (p. 89):

"* * * And again, as other counsel say, the alleged order was nothing more than notice of a hearing which the railroad company might attend or not, as it saw fit.

The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding, the accident of the occasion—in effect, and, it may be contended, in form, but a continuance of the hearing."

CONCLUSION.

The decision of the District Court should be reversed and the cause remanded with directions to the District Court to hear and determine the motion for preliminary injunction, and otherwise proceed with this cause on the merits.

Respectfully submitted,

CHARLES E. HUGHES, JR.,
JOHN J. BURNS,
ALLEN S. HUBBARD,
HAROLD L. SMITH,
RICHARD W. HOGUE, JR.,
WRIGHT TISDALE,
Counsel for Appellant.

APPENDIX

Section 402 of Communications Act of 1934 (47 U. S. C., Sec. 402):

(a) The provisions of the Act of October 22, 1913, ch. 32, 38 Stat. 219, relating to the enforcing or setting aside of the orders of the Interstate Commerce Commission, are hereby made applicable to suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license), and such suits are hereby authorized to be brought as provided in that Act.

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

(3) By any radio operator whose license has been suspended by the Commission.

(c) Such appeal shall be taken by filing with said court within twenty days after the decision complained of is effective, notice in writing of said appeal and a statement of the reasons therefor, together with proof of service of a true copy of said notice and statement upon the Commis-

sion. Unless a later date is specified by the Commission as part of its decision, the decision complained of shall be considered to be effective as of the date on which public announcement of the decision is made at the office of the Commission in the city of Washington. The Commission shall thereupon immediately, and in any event not later than five days from the date of such service upon it, mail or otherwise deliver a copy of said notice of appeal to each person shown by the records of the Commission to be interested in such appeal and to have a right to intervene therein under the provisions of this section, and shall at all times thereafter permit any such person to inspect and make copies of the appellant's statement of reasons for said appeal at the office of the Commission in the city of Washington. Within thirty days after the filing of said appeal the Commission shall file with the court the originals or certified copies of all papers and evidence presented to it upon the application or order involved, and also a like copy of its decision thereon, and shall within thirty days thereafter file a full statement in writing of the facts and grounds for its decision as found and given by it, and a list of all interested persons to whom it has mailed or otherwise delivered a copy of said notice of appeal.

(d) Within thirty days after the filing of said appeal any interested persons may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement both upon appellant and upon the Commission. Any person who would be aggrieved or whose interests would be adversely affected by a reversal or modification of the decision of the Commission complained of shall be considered an interested party.

(e) At the earliest convenient time the court shall hear and determine the appeal upon the record before it, and shall have power, upon such record, to enter a judgment affirming or reversing the decision of the Commission, and

in event the court shall render a decision and enter an order reversing the decision of the Commission, it shall remand the case to the Commission to carry out the judgment of the court: *Provided, however,* That the review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 347 of Title 28, by appellant, by the Commission, or by any interested party intervening in the appeal.

(f) The court may, in its discretion, enter judgment for costs in favor of or against an appellant, and/or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 30 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1026

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,
Respondents.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

CHARLES E. HUGHES, JR.,
JOHN J. BURNS,
ALLEN S. HUBBARD,
HAROLD L. SMITH,
RICHARD W. HOGUE, JR.,
WRIGHT TISDALE,
Counsel for Appellant.

CASES CITED

PAGE

Federal Communications Commission v. *Sanders Brothers Radio Station*, 309 U. S. 470..... 5

Pierce v. *Society of Sisters*, 268 U. S. 510.....12, 13

Rochester Telephone Corp. v. *United States*, 307 U. S. 125 .....10, 11, 12

Scripps-Howard Radio, Inc. v. *Federal Communications Commission*, No. 508, October Term, 1941, decided April 6, 1942, 10 U. S. Law Week, 4322... 19

Shields v. *Utah Idaho Central R. R. Co.*, 305 U. S. 177 14

Terrace v. *Thompson*, 263 U. S. 197.....12, 13

Truax v. *Raich*, 239 U. S. 33.....12, 13

United States v. *Los Angeles & Salt Lake Railroad Co.*, 273 U. S. 299..... 9

Utah Fuel Co. v. *National Bituminous Coal Commission*, 306 U. S. 56, reversing 101 F. (2d) 426..... 13

Village of Euclid v. *Ambler Realty Co.*, 272 U. S. 365 12

Waite v. *Macy*, 246 U. S. 606..... 12

STATUTORY PROVISIONS CITED

PAGE

Communications Act of 1934
- Title III
  - Sec. 303(f) 9
  - Sec. 303(i) 9
  - Sec. 303(r) 9
  - Sec. 312(a) 16
- Title IV
  - Sec. 402(a) 1, 19, 20
  - Sec. 402(b) 16

Urgent Deficiencies Act 1, 2, 10, 12, 14

MISCELLANEOUS CITATIONS

Report of the Attorney General's Committee on Administrative Procedure 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,
Respondents.

No. 1026

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S REPLY BRIEF

This reply brief is addressed to both the brief of the United States and the Federal Communications Commission (which will hereafter be referred to as the brief for the government) and that of Mutual Broadcasting System, Inc. We shall not attempt with respect to either brief to reply to any but the salient contentions advanced.

The government concedes (Brief, pp. 48-49) that the Commission's action promulgating the chain broadcasting regulations was an "order" within the meaning of the Urgent Deficiencies Act and Section 402 (a) of the Communications Act of 1934. Its sole contention is that the action is premature because the administrative process is

not complete. It assumes, and inferentially at least concedes (pp. 41-43), that Columbia's business and operations are presently injured by the very existence of the regulations. Its thesis is solely (pp. 48-49) that the regulations have no immediate "legal" effect, that the conventional requisites of equity jurisdiction are not present and "that therefore no court—be it a statutory court under the Urgent Deficiencies Act or a single judge sitting in equity—would have jurisdiction at the present stage of the proceedings".

The premise upon which this conclusion is primarily predicated is that, because the final regulations were phrased, "No license shall be granted" to a station having a contract of the forbidden type, instead of as they were phrased when first proposed, no licensee "shall enter into any contractual relation" of that type, the regulations lack administrative finality.

Thus the government says (Brief, p. 28):

> "* * * If at the hearing, the applicant or the interveners satisfy the Commission that the applicant's license should be renewed despite the inclusion in his affiliation contract of clauses which do not conform to the regulations, the Commission will modify or waive the regulations and grant the renewal."

It says (p. 56) that "the rules may be reasonable as applied to one applicant and unreasonable as applied to another".

Columbia's affiliated stations have not thus construed the situation. They have assumed that they understood the natural meaning of words in the English language, and have acted accordingly.

In the Statement in its brief the government refers extensively (pp. 14-20) to its Report and Supplemental Re-

port for a statement of the "purposes which underlie the regulations". It says (p. 14):

> "The legality and wisdom of the regulations attacked in these suits are not in issue in these appeals, but the reasons which led to their adoption are closely related to the manner in which they are to be applied by the Commission, and are therefore relevant to the jurisdictional question here presented."

We agree. And we submit that the Report is a conclusive refutation of the idea that the Commission regarded its regulations as mere statements of general policy or as contemplating anything other than automatic application.

The declared purpose of the Commission was to outlaw certain types of covenants which it regarded as probably violative of the Sherman Act or, at least, unduly restrictive of competition.

In Division VII of the Commission's Report entitled "THE EFFECT OF NETWORK-AFFILIATE RELATIONS ON COMPETITION IN THE RADIOBROADCAST INDUSTRY" (beginning R. 102), which is the first division which purports to contain other than factual discussion, the Commission says:

> "The prohibitions of the Sherman Act apply to broadcasting. This Commission, **although not charged with the duty of enforcing that law*, should administer its regulatory powers with respect to broadcasting in the light of the purposes which the Sherman Act was designed to achieve. In the absence of Congressional action exempting the in-

*All italics in quotations in this brief are supplied unless otherwise noted.

dustry from the antitrust laws, *we are not at liberty to condone practices* which tend to monopoly and contractual restrictions destructive of freedom of trade and competitive opportunity."

The Commission concludes (R. 106):

> "* * * Pursuant to the mandate of Congress that it grant licenses and renewals only to stations operating in the public interest, this Commission *must refuse further to license stations* which persist in these practices."

What "these practices", with respect to affiliation contracts, are, the Commission then proceeds to explain in the succeeding subdivisions, each corresponding to one of the numbered regulations as follows: "A. EXCLUSIVE AFFILIATION 1. Licensee allowed to broadcast programs of only one network" (R. 107-113), corresponding to Regulation 3.101; "2. Network allowed to send programs to only one station" (R. 113-115), corresponding to 3.102; "B. LONG-TERM AFFILIATION CONTRACTS" (R. 115-118), corresponding to 3.103; "C. NETWORK OPTIONAL TIME" (R. 118-121), corresponding to 3.104; "D. REJECTION OF NETWORK PROGRAMS" (R. 121-122), corresponding to 3.105.

In none of this exposition of reasons why the above sorts of covenants in affiliation contracts should be outlawed is there a word conveying the slightest intimation that any station having such a contract would be treated in any different way from any other. Instead each subdivision ends with a conclusion that (R. 113):

> "* * * A licensee station does not operate in the public interest when it enters into exclusive arrangements which prevent it from giving the public the

> best service of which it is capable, and which, by closing the door of opportunity in the network field, adversely affect the program structure of the entire industry."

or some substantially equivalent phraseology (R. 115, 118, 121, 122).

The Commission manifestly felt, not only that it had statutory authority, but that it was under a statutory duty, to put an end to these restrictive covenants in the network broadcasting industry. That assumption defined the issue between the Commission and the networks. Columbia contended that the terms of the Communications Act of 1934 and its predecessor, the Radio Act of 1927, their legislative history, and their judicial construction (especially in *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, 474-475), demonstrate that Congress gave the Commission no such mandate, but that such considerations as the Commission relied on in its Report were consciously and intentionally withdrawn from the Commission's application of the standard of "public interest, convenience and necessity". The Commission, however, regarded its duty as so clear that it gave scant attention to the considerations urged by Columbia and NBC with respect to the effect upon the network broadcasting industry of the elimination of these allegedly restrictive covenants. The government concedes (Brief, p. 54) that "There is a *strong likelihood* that they will be followed in proceedings on particular license applications". As Judge Bright said in his dissenting opinion (R. 468), the probability is that the station would be "met with the statement that the Commission has given the matter due considera-

tion and has done what it intends to abide by, as it has definitely said in its report".

When the Commission intended to proceed according to the circumstances affecting particular stations, it made that intention clear in its Report and by the phraseology of the regulation itself. Thus in the subdivision of its Report, "E. NETWORK OWNERSHIP AND OPERATION OF STATIONS" (R. 122-125), which is the foundation of Regulation 3.106, it discusses the competitive and other conditions surrounding the operation of particular network-owned stations and concludes the discussion of its purpose with respect to CBS and NBC as follows (R. 125):

> "In exercising our licensing powers with respect to the renewal of the licenses now held by NBC and CBS, *we propose to consider* the applicability of the two principles hereinbefore set forth. *Subject to the right and opportunity of CBS and NBC to show at hearing in a particular case that public interest requires otherwise,* the Commission will not license to a single network organization more than one station within a given area, nor will it license stations to any network organization in communities where the available outlets are so few or of such unequal desirability as to require that all facilities be open to competition among networks for outlets and among stations for networks."

and the consequent Regulation 3.106, so far as it relates to Columbia, is as follows:

> "No license shall be granted to a network organization * * * for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage power, frequency, or other related

matters) that competition would be substantially restrained by such licensing."

As to Columbia, the Report makes clear (R. 124) that it will surely be denied renewal of its license for its station at Charlotte, N. C., and that its stations in Minneapolis and Washington are in serious danger. But as to the remaining five of the stations operated by Columbia the Report indicates that the question would be open in further hearings before the Commission. No such indication appears with respect to the five regulations affecting the terms of the affiliation contract.

The government attempts to support its assertion to the contrary by references to the concluding paragraph of the Commission's Supplemental Report (R. 31-32) and its Minute of October 31, 1941 (R. 465-466). The impression of flexibility produced by a superficial reading of these expressions disappears upon closer scrutiny in the light of the circumstances in which they were uttered.

The concluding paragraph of the Supplemental Report states:

> "The Commission stands ready at all times to amend and modify its regulations upon the petition of any network, national or regional, or any station or group of stations if it can be shown that those regulations prevent profitable network operations, or unduly disturb any aspect of broadcasting, or that because of special or changed circumstances the chain broadcasting regulations should not be applicable to any particular situation."

On its face this sentence does not purport to relate to Commission action applying the regulations upon proceedings for the renewal of licenses of individual stations, but

to petitions to amend or modify the regulations themselves. The only part of it which might seem to connote any broader interpretation is the final phrase, and there the reference is to a particular "situation", not "station", and the circumstances which it is said might cause an amendment or modification of the regulations are only "special" or "changed" circumstances. This Supplemental Report was itself issued after a re-hearing on the regulations which the Commission entertained on the application of Mutual, but on which the other networks were invited to, and did, present full oral argument on all the regulations (R. 9, 22, 452). When the "Conclusion" in the Supplemental Report is read as a whole the meaning of the phrase "special or changed circumstances" becomes clear. It begins with the statement:

> "The Commission adheres to the views expressed in its report on Chain Broadcasting".

It then says that on the re-hearing requested by Mutual it has concluded that the regulations may be amended to the extent described in the Supplemental Report "without sacrifice of these objectives". Finally, in the sentence just preceding the one relied upon in the government's brief the Commission says:

> "Special circumstances and considerations may be applicable in the case of *regional* networks, and the Commission will examine any further representations on their behalf with especial care."

The Minute of October 31, 1941 must likewise be read in the light of its purpose. That was to permit a station which "wishes to contest" to remain on the air while the

proceedings on its application for renewal of license were pending before the Commission and in the Court of Appeals for the District of Columbia on the station's appeal from an order of the Commission denying renewal. Since the station might, on its appeal to the Court of Appeals, attack either "the validity" of the regulations or "the reasonableness of their application to the particular station" it was natural that the Minute should mention both grounds as comprehended within the hearing which the Commission would accord the station to make its record upon which to prosecute such appeal. But there is nothing in the Minute containing the slightest indication that the hearing before the Commission would be anything more than an opportunity to the station to make such a record, or the Commission's action thereon anything more than an automatic application of the regulations.

We submit that the administrative process may not be deemed incomplete even as to the stations. The regulations promulgated by the order were legislative in character and were asserted to be based both upon the Commission's rule-making power "to make special regulations applicable to radio stations engaged in chain broadcasting" (Sec. 303 (i)), and its general power to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act", including the licensing function (Sec. 303 (r); also Sec. 303 (f)). This Court's opinion in *United States* v. *Los Angeles & Salt Lake Railroad Co.*, 273 U. S. 299, 309 (see our Main Brief, p. 50) strongly suggests that orders made under the rule-making power con-

stitute an accepted category of administrative action which is subject to review at the suit of the parties whose conduct the rules purport to regulate.

But this suit is not brought by any station. It is brought solely by Columbia as a network organization, and is predicated on the damage to its business and operations consequent upon action which its affiliated stations are induced to take because of the requirements of the regulations. On this motion to dismiss for lack of jurisdiction, both the illegality of the Commission's action and the damage, which the complaint alleges is both present and threatened, must be assumed. What injures Columbia is the impact of the regulations as a whole, on its affiliated stations, on advertisers, and on the entire structure of the network broadcasting industry.

In this situation the "conventional requisites of equity jurisdiction" (*Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 132) are satisfied. We submit that this Court's opinion in that case, taken as a whole, indicates clearly that such an order as is here involved is subject to review under the Urgent Deficiencies Act. Although the present case does not fall exactly within any of the categories which the Court said were reviewable, the opinion is instinct with the principle that reviewability is determined by the substance of what the order accomplishes in either maintaining or changing the *status quo*, and not by the language in which it is couched or the method by which the purposed end is to be attained. Here there can be no question that the Commission intended to outlaw covenants of the described character in the affiliation contracts of all stations. That the order will have the intended result by the very threat which it contains and without necessity of

actually carrying out that threat, is shown by the action which a large number of stations have taken even while the order has been under suspension. In promulgating the order the Commission has not, as the government argues (Brief, pp. 24, 55), proceeded "case-to-case". It has covered all cases in a single pronouncement, the effect of which does not depend at all on the "case-to-case" consummation of the threat which it contains. The government's attempt (Brief, pp. 30-31) to analogize the situation presented by the record here to the first group of so-called "negative orders" discussed by this Court in the *Rochester* case completely fails. That group (307 U. S., pp. 129, 130) includes cases where the order sought to be reviewed does not "of itself" adversely affect complainant but "only" affects his rights adversely on the "contingency" of future administrative action. The complaint here alleges that the promulgation of the order of itself caused a large number of Columbia's affiliated stations to repudiate or threaten to repudiate their affiliation contracts long before any "future administrative action" in the form of actual denial of their licenses had happened or, so far as appears in the case of many stations, was even imminent.

The brief of Mutual takes as the text for its first point, in which much the same argument is made as in the government's brief, the doctrine of "primary jurisdiction" referred to in this Court's opinion in the *Rochester* case. It is submitted that that doctrine, as distinguished from the question of prematurity, contains nothing which is relevant to the issue here. The doctrine of "primary jurisdiction" is explained by this court (307 U. S., p. 139) in a passage quoted by Mutual itself (Brief, p. 9), as follows:

> "* * * Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked."

But any and all matters which might be said to call for "technical knowledge" which were in question in the licensing of stations having affiliation contracts of the sort here involved were fully considered and passed upon in the proceeding which culminated in the promulgation of the regulations in issue. The further administrative action upon applications for renewal of licenses will be merely the successive registration of a series of foregone conclusions. The point which Mutual is really making, like the government, is that of prematurity, as is shown by its extended quotation from the much earlier passage in the opinion in the *Rochester* case discussing so-called "Group (1)" and not the doctrine of "primary jurisdiction". As this Court said of "Group (1)" (307 U. S., p. 131), "Plainly the denial of judicial review in these cases does not derive from a regard for the special functions of administrative agencies".

To say that this action is premature is in the teeth of such authorities as *Truax* v. *Raich*, 239 U. S. 33; *Terrace* v. *Thompson*, 263 U. S. 197, and *Pierce* v. *Society of Sisters*, 268 U. S. 510, which we cited in our Main Brief, pages 36-38, 40-41. It makes no difference on that question that those cases did not arise under the Urgent Deficiencies Act. The question is of the presence of the "conventional requisites of equity jurisdiction" and these are the same under the Urgent Deficiencies Act as in any other equity case. The government's attempt (Brief, pp. 38-39, 47) to distinguish these cases, and others which we cited on the question of prematurity, is unavailing. The ultimate ground on which *Waite* v. *Macy*, 246 U. S. 606, and *Village of Euclid* v.

Ambler Realty Co., 272 U. S. 365, rested was that there was no substantial hope for changing the action of the agencies there involved, in any important respect, by administrative action. That is clearly the situation here also. And so far as the requisites of equity jurisdiction are concerned the circumstance that the statutes involved in *Truax* v. *Raich*, *Terrace* v. *Thompson*, and *Pierce* v. *Society of Sisters*, and in some of the Urgent Deficiencies Act cases, contained criminal sanctions is an irrelevant distinction. The sole question with respect to equity jurisdiction is whether the threatened injury is sufficiently likely to become actual to move a court of equity to prevent it. That the statute contains a criminal sanction is one, but only one, indication of such probability. The question in such a case as this is whether the court can see that the invalid governmental pronouncement will cause third persons to take action injurious to the plaintiff. When that appears it makes no difference whether what moves them to do so is fear of criminal prosecution or some other inducement.

In *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U. S. 56, there was an announcement by the Coal Commission that certain cost reports submitted by coal producers would be made available for inspection at a hearing before the Commission. The Court of Appeals for the District of Columbia held that this announcement was not reviewable in a suit in equity principally in the view that it was merely a preliminary step in an administrative proceeding (101 F. (2d) 426). This Court sustained the jurisdiction of the District Court in order to prevent irreparable injury, saying (p. 60):

> "Considering the circumstances here alleged, the great and obvious damage which might be suffered,

> the importance of the rights asserted, and the lack of any other remedy, we think complainants could properly ask relief in equity."

This Court cited as cognate to the question presented, *Shields* v. *Utah Idaho Central R. R. Co.*, 305 U. S. 177, where a determination by the Interstate Commerce Commission that a railroad was not "interurban" although not an "order" within the meaning of the Urgent Deficiencies Act, was nevertheless held reviewable by bill in equity. It is conceded by the government that the order promulgating the regulations here involved was an "order" within the meaning of the Urgent Deficiencies Act and equitable jurisdiction to restrain the enforcement of the order is plain.

The government's argument that the Commission's regulations do not injure Columbia is the extreme of unrealism. In its brief (p. 42) it says:

> "In any event, if affiliated stations insist upon altering their present contractual relationships, that is an act of their own choice and not a result in any way commanded or compelled by the regulations. Any injury thereby inflicted by the affiliated station on the network would not flow from any legal force or effect of the regulations, but would be incidental consequences which would not render the regulations here justiciable."

What the Commission says to the affiliated station is: "If you do not breach your contract with Columbia, you will be denied renewal of your license." No one would seriously argue that if A, having a loaded gun in his hand, says to B, "If you do not break your contract with C, I will kill you", and B does then break the contract, it is only B, and not A,

that has injured C. But the denial of the renewal of a license is economic death to a broadcasting station.

Since the licenses of a great many of the stations have expired between the date of the promulgation of the regulations and the present time, all that has saved Columbia's business from complete disruption has been the successive suspensions of the effective date of the regulations with respect to existing contracts, first by action of the Commission itself and then by orders of the court below. Nothing in the regulations themselves safeguarded it. Nor did the Minute, because that provided for the equivalent of a stay only to a particular station which "wishes to contest" (R. 465). It is clear beyond peradventure that, once the suspensions of the effective date of the order were terminated, and the regulations became effective as to existing contracts, the floodgates would be opened and Columbia exposed to wholesale repudiations by its affiliates.

The government says (Brief, p. 36) that the orders of postponement are without significance because their sole effect has been to defer the date "when the Commission will begin to insist that these issues be dealt with in applications for renewal". But that ignores the practical situation. Any station whose license is about to expire when the suspension of the order is lifted, but has an affiliation contract which has some time still to run, will be immediately faced with the alternatives, presented by the terms of the regulations themselves, of getting rid of the forbidden terms of their affiliation contracts or losing their licenses or engaging in a difficult and expensive litigation in tribunals far from their places of business. As alleged in the complaint most, if not all, of them will choose the first alternative.

This, moreover, reckons without the possibility of the Commission proceeding by way of revocation. Not even

the licensees whose licenses would not expire for some time can be expected to take even a relatively remote chance of revocation of the licenses which are the sole basis of their economic life. On this question of revocation, the government's brief argues (p. 33) that it would have no right to revoke under the language of Section 312(a) to which we referred in our main brief (p. 44), "for violation of or failure to observe any of the restrictions and conditions of this Act or of any regulation of the Commission authorized by this Act". But it concedes (footnote, p. 34) that there might be a basis for revocation under other language in Section 312(a) which authorizes such action "because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application". The obvious reason why the government now objects to predicating its right to revoke upon the language to which we referred is its desire to avoid an implication that operation of a station under an affiliation contract which does not conform to the rules would constitute a "failure to observe" the regulations. Its effort is unconvincing at best, and particularly so in view of the statement in the government's brief below (quoted in our Main Brief, p. 44) asserting a right of revocation "in the event that the Chain Broadcasting Regulations are not *complied with*".

To prevent the damage which Columbia would sustain through the illegal coercion of its affiliated stations by these regulations the procedure under Section 402(b) suggested by the court below is wholly inadequate for reasons set forth in our main brief. The government says (Brief, footnote, p. 45) that "It is difficult to believe that CBS seriously fears that none of its affiliates will litigate" and

refers to certain proposals made by counsel for CBS and NBC mentioned at pages 43 and 48 of the brief of NBC in this Court.

Since the government has gone into this matter argumentatively, we state the facts. The suggestion of counsel for Columbia was not made jointly with that of NBC. Shortly after the decision of the court below was handed down he suggested to counsel for the Commission in substance that, if the Commission were willing to cooperate with Columbia in arranging test cases for review in the Court of Appeals of the District of Columbia, in accordance with the suggestion of the District Court, with adequate provision for the protection of Columbia's interests during their progress, he would carefully consider, in consultation with his client, the adoption of such procedure and the abandonment of the appeal to this Court which he would otherwise be obliged to take. He pointed out, however, that the suggested procedure would be impossible for Columbia unless the Commission would agree to suspend the enforcement of its Order during the pendency of these test cases. Two days later counsel for the Commission replied that the Commission would not entertain the suggestion. It was, of course, implicit in the suggestion that the burden of arranging the test cases would fall upon Columbia and the Commission, and that the Commission would place no obstacles in the way of Columbia's making a satisfactory record for review. The stations whose applications for renewal would have been selected as the test cases need have been nothing more than the vehicle for obtaining the desired adjudication of the question of the validity of the regulations. Since the suggestion was dropped upon the Commission's refusal to entertain it, no effort was made to ascertain whether repre-

sentative stations would be willing to be used for that purpose, but manifestly most of the reasons which would make a station reluctant to assume the burden of a litigation without such arrangement for the cooperation of the Commission would not be present under the procedure suggested.

The material which is peculiar to the brief of Mutual is that contained in its Points II and III. The contentions there made are not espoused by the government and do not require extended reply.

The great bulk of Point II is devoted to an academic review of authorities in an effort to sustain the thesis that in distinguishing between legislative and judicial action by an administrative agency the correct test is whether the order puts into effect a general rule without reference to any particular case, and not the test of future operation, as has been assumed in the vast majority of the opinions of this Court. We call the discussion academic because, even if the thesis were sustained, it would prove nothing relevant to this case. By either test, the order here involved was legislative in character. The only relevant discussion is in subdivision C that "The Word 'Order' Should Not Be Extended to Include Purely Legislative Determinations". But that subdivision is completely unsupported by authority. We refer only incidentally to the opening paragraph of that subdivision:

> "We recognize that governmental machinery should be at hand to provide the necessary check on administrative rule-making of a purely legislative character to keep it within constitutional and statutory limitations. The present question, however, is whether the Urgent Deficiencies Act and Section

402 (a) of the Communications Act do, or were intended to, provide this check."

This strongly suggests that a suit in the general equitable jurisdiction would lie, as suggested by the court below (R. 460), if one under the Urgent Deficiencies Act did not.

Point III seems to be an effort to sustain the ground on which the court below predicated its decision, without acceding to its reasoning, the unsoundness of which was demonstrated in Point First of our Main Brief. But the hypotheses upon which the effort is based are without foundation. The idea that the four kinds of orders which Mutual lists at page 43 of its brief are the only kinds under Title III of the Act which are reviewable under Section 402 (a) is justified by nothing in the terms of the Act or its legislative history or its judicial construction. Counsel's interpretation of the legislative history is quite at variance with that contained in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* No. 508, October Term, 1941, decided April 6, 1942, 10 U. S. Law Week, 4322.

The contention made in Point III is actually that orders made under the rule-making power are subject to no review of any kind. Such a proposition finds no support in any authority. Such a theory is not even suggested in the *Report of the Attorney General's Committee* cited by Mutual at the end of Point II. The opening paragraph of the division of that report to which Mutual refers states (p. 115):

"Until recently, judicial review of administrative regulations could be had only collaterally, in actions

> brought to enforce them, in injunction suits to prevent their enforcement, in declaratory judgment proceedings, in habeas corpus actions to obtain release from arrests for violation, or in private actions in which the results turned upon the effect of regulations. In such an action, the issue may be either the validity of a regulation as a whole or the legality of applying it to the person who is challenging it, in the same way that an attack upon a statute may involve either the constitutionality of the measure as a whole or the constitutionality of applying it to a particular party."

Of course the vast majority of administrative orders made under the rule-making power are never reviewed because there would be no possible basis for attacking them. In the usual case the statutory authority is clear, no constitutional question of substance is involved and the subject matter relates so clearly to technical matters committed to the expert judgment of the administrative body that no case of arbitrary or capricious action could possibly be sustained. The fears expressed in the briefs both of Mutual and the government that a decision favorable to Columbia herein would open the door to a multitude of actions under 402 (a) to review the large body of miscellaneous routine technical regulations of the Commission are wholly unfounded. We know of no regulations ever promulgated by the Commission which are at all comparable to those here involved. The case presents a fundamental question of the scope of the authority of the Commission to import into the standard of "public convenience, interest and necessity" considerations nowhere found in the Communications Act but relating to public policy expressed in other statutes

the enforcement of which is committed to other governmental agencies. The seriousness of the grounds on which appellant attacks the validity of the order is attested by the anxiety of the Commission to escape any effective review on the merits.

Respectfully submitted,

CHARLES E. HUGHES, JR.,
JOHN J. BURNS,
ALLEN S. HUBBARD,
HAROLD L. SMITH,
RICHARD W. HOGUE, JR.,
WRIGHT TISDALE,
Counsel for Appellant.

FILE COPY

Office - Supreme Court, U. S.
FILED
APR 28 1942
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1941

No. 1026

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,
Respondents.

MOTION FOR TEMPORARY RESTRAINING ORDER, NOTICE OF MOTION AND AFFIDAVIT IN SUPPORT OF MOTION

CHARLES E. HUGHES, JR.,
JOHN J. BURNS,
Counsel for Appellant.

Supreme Court of the United States

OCTOBER TERM, 1941

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,
Respondents.

No. 1026

MOTION FOR TEMPORARY RESTRAINING ORDER

Upon the annexed affidavit of William S. Paley, sworn to April 27, 1942, the complaint and all the affidavits and other papers filed herein and set forth in the transcript of record on this appeal, and all the proceedings heretofore had herein, the appellant moves this Court for an order suspending, and restraining the operation, enforcement or execution of, the order of the Federal Communications Commission, one of the respondents herein, in Docket No. 5060, made May 2, 1941, as amended October 11, 1941, the order involved on said appeal, until ten days after the filing in the District Court of the mandate upon this Court's decision on said appeal; and for such other and further relief as to this Court may seem just.

Dated, April 27, 1942.

CHARLES E. HUGHES, JR.,
1 Wall Street,
New York, N. Y.

JOHN J. BURNS,
40 Wall Street,
New York, N. Y.
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,
Respondents.

No. 1026

NOTICE OF MOTION

Sirs:

PLEASE TAKE NOTICE that the above motion will be submitted to the Court at the Courthouse of the Supreme Court of the United States, Washington, D. C., on the day on which the appeal herein is called for argument, at 12 o'clock noon on that day or as soon thereafter as said motion can be submitted.

Dated, April 27, 1942.

CHARLES E. HUGHES, JR.,
1 Wall Street,
New York, N. Y.

JOHN J. BURNS,
40 Wall Street,
New York, N. Y.,
Counsel for Appellant.

To:

CHARLES FAHY, Esq.,
Solicitor General,
Department of Justice,
Washington, D. C.

TELFORD TAYLOR, Esq.,
General Counsel,
Federal Communications Commission,
Washington, D. C.

LOUIS G. CALDWELL, Esq.,
Counsel for Mutual Broadcasting System, Inc.,
Washington, D. C.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

vs.

THE UNITED STATES OF AMERICA; FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,
Respondents.

No. 1026

AFFIDAVIT IN SUPPORT OF MOTION

United States of America,
Southern District of New York,
City, County and State of New York, ss.:

WILLIAM S. PALEY, being duly sworn, deposes and says:

I am, and since September 26, 1928 have been, the President of Columbia Broadcasting System, Inc., the appellant herein.

This is an appeal from a district court decree dismissing, for want of jurisdiction over the subject matter, a suit by appellant to set aside an order of respondent Federal Communications Commission (hereinafter called the "Commission") promulgating regulations applicable to radio stations engaged in chain or network broadcasting. For a description of the suit I respectfully refer the Court to the Statement in appellant's brief on this appeal.

The object of appellant's annexed motion, in support of which this affidavit is made, is to restrain enforcement of the regulations for an appropriate period after the expiration of a temporary restraining order which was made by the District Court following the decision below and prior to the allowance of the appeal (R. 482). Although appellant had moved in the District Court for restraint of enforcement pending the hearing and determination of the appeal (R. 473), the District Court restrained enforcement only until May 1, 1942 or the argument of the appeal, whichever is earlier (R. 482), saying, in its *per curiam* opinion, "For any further stay the plaintiffs must apply to the Supreme Court itself, or to the Circuit Justice" (R. 481).

In holding that appellant was entitled to a stay, the District Court, in its *per curiam* opinion, said (R. 480-481):

> "The Commission is of course right in saying that we have decided that the plaintiffs have adequate protection outside of these actions and in spite of their dismissal; nevertheless, in deciding whether a stay should be granted pending an appeal, we must assume that we may be mistaken, certainly a not unreasonable assumption in view of Judge Bright's dissent. If so, the plaintiffs will not be adequately protected, and indeed they may not be anyway if the Commission does not withhold enforcement in all cases until the issues could be once and for all determined in a renewal proceeding. Considering on the one hand that if the regulations are enforced the networks will be obliged to revise their whole plan of operations to their great disadvantage, and on the other that the Commission itself gave no evidence before these actions were commenced that the proposed changes were of such immediately pressing

importance that a further delay of two months will be a serious injury to the public, it seems to us that we should use our discretion in the plaintiffs' favor to stay enforcement of the regulations until they can argue their appeal. For these reasons we will grant such a stay until the argument of the appeal before the Supreme Court or the first day of May, 1942, whichever comes first."

The findings of fact and conclusion of law upon which the action of the District Court was based were as follows (R. 481-482):

"FINDINGS OF FACT

I. That if the Federal Communications Commission, pending the plaintiff's appeal to the Supreme Court from the judgment of this court dismissing the complaint herein, enforces its regulations, issued in their amended form on October 11, 1941, and if these are invalid; and if this court—contrary to its said judgment—has in fact jurisdiction over the cause of action stated in the complaint; the plaintiff will be seriously and irreparably damaged.

II. That the said Commission has not declared that it will not enforce such regulations pending the appeal, except as to a station itself seeking to test their validity.

III. That the Commission, in the hearings leading to the said regulations and especially in its consideration of the evidence taken thereon, did not indicate that their immediate enforcement was a matter of urgent public interest.

IV. That a further delay in such enforcement of two months or until the appeal can be argued, whichever is earlier, will not, so far as can be ascertained, involve injury to the public commensurate

with the injury to the plaintiff arising from enforcement, if the conditions mentioned in the First Finding exist.

CONCLUSION OF LAW

That the plaintiff is entitled to a stay pending its appeal to the Supreme Court; said stay being an order forbidding the Federal Communications Commission from enforcing the regulations above mentioned before the argument of the appeal to the Supreme Court, or the first day of May, 1942, whichever is earlier."

Facts amply supporting these findings and conclusion as to appellant's right to a stay pending the appeal are fully set forth in my affidavits sworn to February 25, 1942 (R. 474-478) and October 30, 1941 (R. 223, 249-252) and the affidavits of Herbert V. Akerberg sworn to October 29, 1941 (R. 260-285) and January 5, 1942 (R. 306, 308-316), to which I respectfully refer the Court in lieu of a repetition of such facts in this affidavit. The danger of irreparable injury to Columbia if enforcement of the regulations is not restrained is as great now as it was when those affidavits were made.

Following the allowance of the appeal the Commission and the United States were requested to enter into a stipulation which would suspend the order promulgating the regulations until ten days after the determination of this appeal. They refused to enter into such a stipulation but did enter into a stipulation dated April 27, 1942, a copy of which is annexed hereto as Exhibit A, to the effect that the Commission would suspend and would take no steps for enforcement or application of the order, with respect to any failure by any radio station to comply therewith, until the last

decision day of the October Term, 1941, or the determination of this appeal, whichever is earlier.

The present motion was made necessary by the failure of either the District Court's temporary restraining order or the stipulation referred to above to provide appellant with protection from enforcement of the regulations for the period from the end of the present term until the decision of this appeal, if the appeal is not decided at this term, or for a reasonable period after the decision of the appeal, whether it be a reversal or an affirmance, to permit appellant to seek appropriate temporary restraint of enforcement pending further pursuit of permanent relief or to take steps to minimize the injury which would result from the taking effect of the regulations.

I respectfully submit that, for the following reasons, extension of the restraint upon enforcement of the regulations for ten days after the filing in the District Court of the mandate upon this Court's decision on the appeal would be appropriate in this case, regardless of whether the decision below is reversed or affirmed (*Board of Trade of the City of Chicago* v. *Clyne*, 260 U. S. 704, 262 U. S. 1).

If the decision below is reversed, it is appellant's intention promptly to seek from the District Court a determination of appellant's motion for preliminary injunction. A few days after the commencement of this suit, appellant having moved in the District Court for a temporary restraining order and a preliminary injunction, (R. 221-222), the Commission stipulated that, pending the hearing by the District Court on the motion for preliminary injunction and the cross motion to dismiss the complaint or in the alternative for summary judgment and the determination of the motion for preliminary injunction, the Commission was suspending and would take no steps for enforcement or application of the order promulgating the regulations,

with respect to any failure by any radio station to comply with such order (R. 454-455), and by a letter dated November 10, 1941 counsel for the Commission, writing to appellant's attorney to express the understanding of the parties with respect to matters not covered in this stipulation, said (R. 478-479):

> "In the event that the Court in said proceedings denies plaintiff's motion for a preliminary injunction, defendant Federal Communications Commission will take no steps to enforce or apply its said Order for a period of not less than ten days after service of an order of the Court with notice of entry so disposing of plaintiff's motion."

It is not clear whether, in view of the District Court's refusal to pass upon the motion for preliminary injunction (R. 463), the Commission will recognize that the stipulation has any remaining force, and it may be necessary for appellant to apply to the District Court for a temporary restraining order pending determination of the motion. Restraint upon enforcement of the regulations should be extended to permit appellant to do this.

If the decision below is affirmed, it will be necessary for appellant promptly to pursue such remedy as may be available to it or to make such arrangements with its 115 affiliated stations as would salvage the surviving benefits of network affiliation and thus avoid the complete disintegration of appellant's network which would otherwise follow dismissal of the present suit. Restraint upon enforcement of the regulations should be extended to permit appellant to do this.

Maintenance of the *status quo* until ten days after the filing in the District Court of the mandate upon this Court's decision on this appeal will not adversely affect the public

interest. As the District Court pointed out in its *per curiam* opinion and its findings on appellant's motion for a temporary restraining order (R. 480, 481), the Commission has given no indication that immediate enforcement of the regulations is a matter of urgent public interest.

WHEREFORE appellant prays that this Court enter an order granting the relief set forth in the accompanying motion.

WILLIAM S. PALEY.

Subscribed and sworn to before me
this 27th day of April, 1942.

CHARLES S. WHITMAN, JR.

CHARLES S. WHITMAN, JR.
Attorney and Counsellor-at-Law
N. Y. Co. Clk's No. 10 Reg. No. 4W216
Kings Co. Clk's No. 15 Reg. No. A4007
Bronx Co. Clk's No. 3 Reg. No. W44-6
Commission expires March 30, 1944

[SEAL]

EXHIBIT A

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

COLUMBIA BROADCASTING SYSTEM, INC., *Appellant*, vs. THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC., *Respondents.*	No. 1026

STIPULATION

IT IS HEREBY STIPULATED by and between all the parties by their respective counsel that:

Until the last decision day of the October, 1941 term of the Supreme Court of the United States or until the determination of the pending appeal in the above entitled case by said Court, whichever is earlier, the respondent Federal Communications Commission is suspending, and will take no steps for enforcement or application of, the Commission's Order of May 2, 1941, in Docket No. 5060, as last amended October 11, 1941, with respect to any failure by any radio station to comply with such order.

Dated, April 27, 1942.

CHARLES FAHY
Solicitor General of the United States

TELFORD TAYLOR
General Counsel for Federal Communications Commission

CHARLES E. HUGHES, JR.
Counsel for Columbia Broadcasting System, Inc.

LOUIS G. CALDWELL
Counsel for Mutual Broadcasting System, Inc.

p. 12.
p. 14. dissent.

SUPREME COURT OF THE UNITED STATES.

No. 1026.—OCTOBER TERM, 1941.

Columbia Broadcasting System, Inc., Appellant, *vs.* The United States of America, Federal Communications Commission and Mutual Broadcasting System, Inc.	Appeal from the District Court of the United States for the Southern District of New York.

[June 1, 1942.]

Mr. Chief Justice STONE delivered the opinion of the Court.

The Federal Communications Commission, by its order of May 2, 1941, as amended by its order of October 11, 1941, promulgated regulations which purport to require the Commission to refuse to grant a license to any broadcasting station which enters into certain defined types of contract with any broadcasting network organization. These regulations, it is alleged, affect adversely appellant's contractual relations with broadcasting stations and impair its ability to carry on its business in maintaining and operating its nationwide broadcasting network. The regulations as amended on October 11, 1941, together with a supplemental "minute" promulgated by the Commission on October 31, 1941, are set forth at the end of this opinion. The question for our decision is whether appellant is entitled to secure a judicial review of the order by a suit brought under § 402(a) of the Communications Act of 1934, 48 Stat. 1093, 47 U. S. C. § 402(a), and the Urgent Deficiencies Act, 38 Stat. 219, 28 U. S. C. § 47.

Pursuant to § 402(a) appellant brought the present suit against the United States in the Southern District of New York, to enjoin enforcement of the Commission's order as contrary to the public interest and beyond the Commission's statutory authority, and on the further ground, if the order be deemed within that authority, that the statute is an unconstitutional delegation of legislative

power by Congress in violation of Article I, § 1 of the Constitution, and operates to deprive appellant of property without due process of law in violation of the Fifth Amendment. The case was heard by a court of three judges, which permitted the Commission and the Mutual Broadcasting Company to intervene as defendants. It granted appellees' motion to dismiss the complaint for want of jurisdiction, — F. Supp —, and stayed the operation of the Commission's order pending direct appeal to this Court.

In 1938 the Communications Commission authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity". Extensive hearings were held by a committee consisting of three members of the Commission, at whose request the national networks, including appellant, intervened. In June, 1940, the committee made a report, on the basis of which briefs were filed and oral argument was presented before the full Commission by the three national networks and other interested parties. In May, 1941, the Commission issued its "Report on Chain Broadcasting" and ordered the adoption of the regulations which, in their amended form, are the subject of the present controversy.

The relevant facts stated in the bill of complaint are as follows: Appellant or its predecessor has been engaged in the business of nationwide network or chain broadcasting since 1927. It has a large amount of physical property used in the business and has built up a valuable goodwill. For its broadcasts it maintains a staff of employees and expends large amounts for musicians and broadcasting performers. It has commitments by long-term contracts aggregating more than $4,000,000 for broadcasting expenditures, including those for the use of land and buildings and for the furnishing of news and broadcasting programs in the next few years. Appellant's total property devoted to its broadcasting business exceeds $18,000,000 in value; its earnings from the network exceeded $3,000,000 in both 1939 and 1940.

Chain broadcasting is the means by which radio programs are made available to all or a large part of the nationwide radio audience. It is defined by the Communications Act, 47 U. S. C. § 153(p), as the "simultaneous broadcasting of an identical program by two or more connected stations". The chain broadcaster

prepares radio programs, for which it engages performers in advance, and simultaneously broadcasts them over a large number of radio stations to which the programs are transmitted from some central point of origination by wire telephone lines leased by the broadcaster, here the appellant. The programs, which are prepared well in advance of the broadcast and given by persons employed for the purpose by appellant, are of two classes—commercial programs sponsored and paid for by advertisers, and sustaining programs furnished by appellant and not paid for by any advertiser.

Appellant's network comprises 123 stations in 122 cities in the United States. It is so operated as to enable ninety per cent of the radio audience of the United States to listen simultaneously to programs provided by appellant and broadcasted over these stations. Appellant owns and operates seven of the stations and leases an eighth, all licensed by the Commission. With the remaining 115 stations it enters into individual contracts usually for periods of five years, terminable in some instances by appellant on twelve months' notice. By these contracts appellant undertakes to furnish each station with an average of at least sixty hours per week of network sustaining and sponsored programs. The sustaining programs are furnished without charge, the station being free to use them or not as it chooses. Appellant undertakes to furnish the station with all commercial programs which the sponsor requests the station to broadcast and to pay the station a specified hourly rate for the use of its facilities in broadcasting such programs. Appellant agrees not to furnish its programs to other stations in the same city; the affiliated station, with exceptions not now material, agrees not to broadcast the program of any other network. Of critical importance in the present litigation is the stipulation of the affiliated station that it will, upon not less than twenty-eight days' notice from appellant, broadcast the sponsored or commercial program furnished to it by appellant for at least fifty "converted" hours (averaging seventy-nine regular clock hours) per week.

These provisions of appellant's contracts are alleged to be indispensable to the maintenance and efficient operation of its network and to the existence of a strong and efficient network broadcasting system, and necessary to enable appellant to com-

pete with other advertising media. On May 2, 1941 the Commission issued its order which, as amended by its order of October 11, 1941, promulgated the "Chain Broadcasting Regulations" of which appellant complains, and which the Commission characterized in its Report as "the expression of the general policy we will follow in exercising our licensing power".[1] The regulations provide that no license shall be granted to a broadcast station having contracts with a network organization, containing any of several provisions which are characteristic of appellant's contracts with its affiliates. These include provisions by which the station is prevented from broadcasting the programs of any other network organization (3.101); or which prevent another station serving substantially the same area from broadcasting the network programs not taken by the station applying for license, or prevent another station serving a substantially different area from broadcasting any program of the network organization (3.102); or by which the station contracts for affiliation with the network for a period longer than two years (3.103); or by which the station "options for network programs any time subject to call on less than 56 days' notice or more time than a total of three hours" within each of four specified segments of the broadcast day, the regulation declaring "such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations" (3.104); or which prevent the station (a) from rejecting network programs which the station reasonably believes to be unsatisfactory or unsuitable or (b) from substituting for the network program a program of outstanding local or national importance (3.105).

---

[1] The Commission in its Report says, p. 85:

"We believe that the announcement of the principles we intend to apply in exercising our licensing power will expedite business and further the ends of justice.

"Announcements of policy may take the form of regulations or of general public statements. In either case, the applicant's right to a hearing on the question whether he does in fact propose to operate in the public interest is fully preserved. The regulations we are adopting are nothing more than the expression of the general policy we will follow in exercising our licensing power. The formulation of a regulation in general terms is an important aid to consistency and predictability and does not prejudice any rights of the applicant. Good administrative practice would seem to demand that such a statement of policy or rules and regulations be promulgated wherever sufficient information is available upon which they may be based."

After making its order of May 2, 1941, the Commission deferred its effective date until further order. By its order of October 11, 1941, the Commission fixed the effective date as November 15, 1941, and directed "that the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties", and "that the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

The bill of complaint also alleges that the purpose and effect of the regulations are to prohibit station licensees from having agreements of the kind which appellant has with its affiliates; that prior to the order of May 2, 1941, it was the practice of the Commission to renew the licenses of stations annually and that the licensed stations have had a reasonable expectancy of the annual renewal of their licenses; that 115 licensed stations have such contracts with appellant expiring at various times between the original effective date of the regulations and December 31, 1947. It is alleged that when their current licenses expire, at the latest, and perhaps earlier through the revocation of existing licenses, such stations face the loss of their licenses if they perform or continue in force or renew any existing contracts containing the described provisions.

The bill alleges that since the stations fear the loss of their licenses, as a result of the regulations, they will not negotiate for or renew affiliation contracts containing such provisions. And because they fear the loss of their licenses the stations have threatened to cancel and repudiate their affiliation contracts, and many have notified appellant that they will not be bound by their contracts after the regulations become effective. As a consequence appellant's ability to conduct its business and maintain its public broadcasting service is seriously impaired and the regulations will make the operation of appellant's business more costly, reduce its earnings and render its property and business less valuable.

The bill of complaint was filed October 30, 1941. The following day the Commission promulgated a supplemental "minute" setting up a procedure by which the validity of the regulations might be tested upon application for a license by an individual licensee.

The minute declared that if a station wished to challenge the regulations the Commission would grant a temporary extension of its license until there had been a final court determination of the issues. In the event of such litigation, and if the validity of the regulations were sustained, "the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision".

An affidavit subsequently submitted by appellant in support of its motion for a temporary injunction states that since the Commission's minute of October 31st, appellant has continued to receive indications that its affiliates will cancel and repudiate their contracts and refuse to renew them, and has received no indication that the minute has or will have the effect of inducing stations to assume the burden of testing the validity of the regulations. Attached to the affidavit are letters from five affiliates, written after October 31st, indicating their intention not to be bound by the contracts. The affidavit also states appellant's belief that it would have received more such letters had it not been for its circulation of information concerning the pendency of this suit.

Accepting the allegations of the complaint as true, as for present purposes we must, it is evident that application by the Commission of its regulations in accordance with their terms would disrupt appellant's broadcasting system and seriously disorganize its business. As the bill alleges, station licenses have been renewable by the Commission annually,[1] whereas appellant's contracts are for five year periods and many of them will survive the expiration of the existing licenses to the affiliated stations. Under Regulations 3.101, 3.102, 3.103 and 3.104, each affiliate must repudiate his contract or be denied the renewal of his license. In either case this would deprive appellant of the station's participation in its network, for which its contracts call.

Regulation 3.104 not only requires all options by appellant to be exercised on 56 days' rather than 28 days' notice as at present, but provides that no option time is exclusive of other networks, and thus allows to appellant no option time within which it can command the use of affiliated stations for any program for broadcasting on a national scale. These sections together thus operate

[1] On October 11, 1941, the Commission amended Regulation 3.34 to make the normal license period two years.

to break down the network enterprise in which appellant and its affiliates are by their contracts cooperating, and to substitute a system in which every station is available to every network on a "first come first served basis".

The Commission concedes by its brief that as provided by §312(a) "Any station license may be revoked . . . because of conditions revealed by such statements of fact as may be required [of a licensee] from time to time which would warrant the Commission in refusing to grant a license on an original application". Consequently the regulations by their terms, read in conjunction with § 312(a), expose licensees, who renew their affiliation contracts, to revocation proceedings by the Commission whenever upon a statement which the Commission may require it appears that the licensee has entered into an affiliation contract which the regulations proscribe.

A proceeding to set aside an order of the Commission under § 402(a) and the Urgent Deficiencies Act is a plenary suit in equity. Hence the questions raised by the motion to dismiss are whether the Commission's order is an "order", review of which is authorized by § 402(a) of the Act, and if so whether the bill states a cause of action in equity. The suit cannot be maintained unless both questions are answered in the affirmative.

Section 402(a) makes applicable the provisions of the Urgent Deficiencies Act to "suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission" except orders "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, or suspending a radio operator's license". Review of the orders excepted from § 402(a) is by appeal to the Court of Appeals of the District of Columbia under the provisions of § 402(b). See *Scripps-Howard Radio, Inc.* v. *Federal Communications Comm'n*, 315 U. S. —. Since the Commission's order neither grants, denies nor modifies any license, any review in advance or independently of an application for a station license must be under § 402(a), and then only if the Commission's order promulgating the regulations is an "order" within the meaning of this section. The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is de-

cisive. *Powell* v. *United States*, 300 U. S. 276, 284-85; *A. F. of L.* v. *Labor Board*, 308 U. S. 401, 408.

The Commission's investigation of the contractual relations between the networks and the stations, which resulted in the order now under attack, was for the stated purpose of prescribing regulations of such relationships. The order authorizing the investigation recited that the proceeding was taken under § 303(i) of the Act, which gives the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcasting". Since the Commission is not in terms given authority to regulate contractual relations between the stations and the networks, regulation of them could be accomplished only by regulating licensed radio stations which participate in chain broadcasting. It was by regulations in terms applicable to such stations that the Commission sought to control their contractual relationships with the networks.

The order is thus in its genesis and on its face, and in its practical operation, an order promulgating regulations which operate to control such contractual relationships, and it was adopted by the Commission in the avowed exercise of its rule-making power. Such regulations which affect or determine rights generally, even though not directed to any particular person or corporation, when lawfully promulgated by the Interstate Commerce Commission, have the force of law and are orders reviewable under the Urgent Deficiencies Act. *Assigned Car Cases*, 274 U. S. 564; *United States* v. *B. & O. R. Co.*, 293 U. S. 454. And regulations of like character, by which the Communications Commission has prescribed generally the records and accounts to be kept by telephone companies subject to its jurisdiction, are similarly reviewable under § 402(a). *A. T. & T. Co.* v. *United States*, 299 U. S. 232.

The regulations here prescribe rules which govern the contractual relationships between the stations and the networks. If the applicant for a license has entered into an affiliation contract, the regulations require the Commission to reject his application. If a licensee renews his contract, the regulations, with the sanction of § 312(a), authorize the Commission to cancel his license. In a proceeding for revocation or cancellation of a license, the decisive question is whether the station, by entering into a contract, has forfeited its right to a license as the regulations prescribe. It is the signing of the contract which, by virtue of the regulations alone, has legal consequences to the stations and to appellant.

The regulations are not any the less reviewable because their promulgation did not operate of their own force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract. If an administrative order has that effect it is reviewable and it does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty incurred under its regulations for non-compliance. *Assigned Car Cases, supra; A. T. & T. Co.* v. *United States, supra.*

The regulations are rules which in proceedings before the Commission require it to reject and authorize it to cancel licenses on the grounds specified in the regulations without more. If the regulations are valid they alter the status of appellant's contracts and thus determine their validity in advance of such proceedings. By striking them down by a determination proclaimed in advance that licenses shall be cancelled or refused because of a previous failure to comply with the regulations, they impose a penalty and sanction for noncompliance far more drastic than the fines customarily inflicted for breach of reviewable administrative orders.

Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. And in this case it is alleged without contradiction that numerous affiliated stations have conformed to the regulations to avoid loss of their licenses with consequent injury to appellant.

Such regulations have the force of law before their sanctions are invoked as well as after. When as here they are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of § 402(a) and the Urgent Deficiencies Act. *A. T. & T. Co.* v. *United States,*

supra; Rochester Tel. Corp. v. *United States*, 307 U. S. 125; *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194; *Kansas City So. Ry.* v. *United States*, 231 U. S. 423; *Assigned Car Cases, supra*; *Chicago R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80; *United States* v. *B. & O. R. Co., supra.*

It is no answer to say that the regulations are addressed only to the Commission and merely prohibit it from granting—and authorize it to cancel—licenses in the case of all stations entering into such contracts, and that accordingly all stations are left free to enter into contracts or not as they choose. They are free only in the sense that all those who do not choose to conform to regulations which may be determined to be lawful are free by their choice to accept the legal consequences of their acts. Failure to comply with the regulations entails such consequences to the station owner and to appellant. These are the loss of the affiliated stations' licenses if they adhere to their contracts, and disruption of appellant's network through the declared unlawfulness of the contracts, if the regulations are valid.

The purposes sought to be accomplished by § 402(a) and the Urgent Deficiencies Act would be defeated if a suitor were unable to resort to them to avoid reasonably anticipated irreparable injury resulting from such legal consequences of the Commission's order, merely because the Commission as yet has neither refused to renew a license, as the regulations require, nor cancelled a license, as the regulations permit. Such an argument addressed to the form rather than the substance of the order was rejected in *Powell* v. *United States, supra*; cf. *A. F. of L.* v. *Labor Board, supra*, 408. The *Powell* case likewise repudiates the suggestion that merely because the order is not in terms addressed to those whose rights are affected, they cannot seek its review. See also *Western Pacific* v. *South. Pac. Co.*, 284 U. S. 47; *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U. S. 382.

The order here is not one, as the Government argues and as the court below seemed to think, where the complainant's rights are affected only on the contingency of future administrative action as in *United States* v. *Los Angeles R. R.*, 273 U. S. 299; cf. *Rochester Telephone Corp.* v. *United States, supra*, 130. As the Court declared in the *Los Angeles* case, 309, 310, reviewable orders are "an exercise either of the quasi-judicial function of determining controversies or of the delegated function of rate mak-

ing and rule making". And the Court pointed out that the "so-called order" in that case did not "determine any right or obligation" or change the plaintiff's "existing or future status or condition", and that it was "merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission" and "is the exercise solely of the function of investigation."

Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations. The regulations' applicability to all who are within their terms does not depend upon future administrative action. Instead they operate to control such action and to determine in advance the rights of others affected by it. The Commission gave its own recognition that such is their operation by its successive postponements of the effective date of the order for a period now expired, and by its suspension of Regulations 3.106 and 3.107, in order to enable the networks to dispose of their properties.

Of course the Commission was at liberty to follow a wholly different procedure. Instead of proclaiming general regulations applicable to all licenses, in advance of any specific contest over a license, it might have awaited such a contest to declare that the policy which these regulations embody represents its concept of the public interest. As a matter of sound administrative practice, both the rule-making proceeding and the specific license proceeding undoubtedly have much to commend them. But they are by no means the same, nor do they necessarily give rise to the same kind of judicial review. Having adopted this order under its rule-making power, the Commission cannot insist that the appellant be relegated to that judicial review which would be exclusive if the rule-making power had never been exercised and consquently had never subjected appellant to the threatened irreparable injury.

The court below assumed that if appellant h any equitable cause of action, it must be prosecuted in an ordin. y suit and not under the provisions of the Urgent Deficiencies Act. But we think this mistakes both the nature of the regulations and the purpose of suits under that Act, as incorporated in § 402(a). Such a cause of action obviously can arise only because of the operation of the

regulations. The regulations are the effective implement by which the injury complained of is wrought, and hence must be the object of the attack. It is because they are an exercise of the rule-making power, and because they presently determine rights on the basis of which the Commission is required to withhold licenses and authorized to cancel them, that there is an order within the meaning of § 402(a) and the Urgent Deficiencies Act.

The Commission argues that since its Report characterized the regulations as announcements of policy, the order promulgating them is no more subject to review than a press release similarly announcing its policy. Undoubtedly regulations adopted in the exercise of the administrative rule-making power, like laws enacted by legislatures, embody announcements of policy. But they may be something more. When, as here, the regulations are avowedly adopted in the exercise of that power, couched in terms of command and accompanied by an announcement of the Commission that the policy is one "which we will follow in exercising our licensing power", they must be taken by those entitled to rely upon them as what they purport to be—an exercise of the delegated legislative power—which, until amended, are controlling alike upon the Commission and all others whose rights may be affected by the Commission's execution of them. The Commission's contention that the regulations are no more reviewable than a press release is hardly reconcilable with its own recognition that the regulations afford legal basis for cancellation of the license of a station if it renews its contract with appellant.

Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked. *Chicago Junction Case*, 264 U. S. 258, 266-68; *Western Pacific* v. *South. Pac. Co.*, *supra*; *Claiborne-Annapolis Ferry Co.* v. *United States*, *supra*; compare, in the case of an attack upon the validity of a statute, *Truax* v. *Raich*, 239 U. S. 33, 38-39; *Pierce* v. *Society of Sisters*, 268 U. S. 510.

What we have said of the allegations of the complaint, and of the effect of the Commission's order if those allegations are sustained upon the trial, is enough to establish the threat of irreparable injury to appellant's business and to show also that the injury can not be avoided, as the Commission suggests, by appellant's intervention in proceedings upon applications for renewal of licenses by its affiliates or in proceedings to cancel their licenses, if and when such proceedings are instituted. Appellant has sufficiently alleged that the affiliates are cancelling or threatening to cancel their contracts in order to conform to the regulations. It is to avoid the irreparable injury which would result from such wholesale cancellations of its contracts, induced by the force of the regulations, that appellant makes its attack on them now rather than in later proceedings on the individual applications for licenses in those cases, if any, in which the stations are willing to seek licenses without complying with the prerequisites laid down by the regulations.

The issues in such a proceeding are not necessarily the same as the issues here. Intervention in it would afford appellant no assurance either of an adjudication of appellant's contentions or that the action of other stations would be governed by it. Moreover, if the Commission's order is as we hold a reviewable order, appellant is free to seek review under § 402(a). It is not thereby, as the court below seemed to think, improperly substituting a different procedure and court for that which Congress has prescribed for the trial of like issues so far as they may be raised on review of an order denying a license. Such issues may likewise be involved in a proceeding, upon the Commission's own motion, for modification or cancellation of a license, which concededly is reviewable under § 402(a). See *Scripps-Howard Radio, Inc., v. Federal Communications Commission, supra.* But review of the order by a licensee in such a proceeding affords no adequate remedy. If ever instituted, which is uncertain, it would come too late to save appellant from the injury wrought by the outlawry of its contracts.

Nor does the Commission's minute, filed after the present suit was brought, afford an adequate basis for requiring appellant to seek relief by intervention in a proceeding on application for a license reviewable under § 402(b). In that event the minute would not operate to broaden the issues involved in the renewal application. Nor would it afford a basis for restraining enforcement

of the regulations as to other affiliated stations, pending adjudication of the validity of the regulations. Without full exploration of the subject, such as can be had only at the trial, we cannot say that the minute will afford a sufficient inducement to persuade the affiliated stations to cease cancellations and assume the initiative in litigating the validity of the regulations and of the contracts which they undertake to condemn. The affidavit filed in the court below on the application for a stay is to the contrary. And in any case we are of the opinion that there are no equitable principles by which the right of appellant, upon the showing made by its complaint and affidavit, to test the order under § 402(a) can justly be suspended to await action which the station owners may or may not take in assuming the burden of challenging the regulations.

We need not stop to discuss here the great variety of administrative rulings which, unlike this one, are not reviewable—either because they do not adjudicate rights or declare them legislatively, or because there are adequate administrative remedies which must be pursued before resorting to judicial remedies, or because there is no occasion to resort to equitable remedies. But we should not for that reason fail to discriminate between them and this case in which, because of its peculiar circumstances, all the elements prerequisite to judicial review are present. The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.

We conclude that the Commission's promulgation of the regulations is an order reviewable under § 402(a) of the Act, and that the bill of complaint states a cause of action in equity. The stay now in effect will be continued, on terms to be settled by the court below.

Reversed.

Mr. Justice BLACK took no part in the consideration or decision of this case.

ORDER OF MAY 3, 1941, AS AMENDED OCTOBER 11, 1941

Now, therefore, it is hereby ordered, That the following regulations be and they are hereby adopted:

SEC. 3.101. *Exclusive affiliation of station.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization.

SEC. 3.102. *Territorial exclusivity.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization.

SEC. 3.103. *Term of affiliation.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, expressed or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years: *Provided*, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period.

SEC. 3.104. *Option time.*—No license shall be granted to a standard broadcast station which options for network programs any time subject to call on less than 56 days' notice, or more time than a total of three hours within each of four segments of the broadcast day, as herein described. The broadcast day is divided into 4 segments, as follows: 8:00 a. m. to 1:00 p. m.; 1:00 p. m. to 6:00 p. m.; 6:00 p. m. to 11:00 p. m.; 11:00 p. m. to 8:00 a. m. Such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations.

SEC. 3.105. *Right to reject programs.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affilia-

tion contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance.

SEC. 3.106. *Network ownership of stations.*—No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing.

SEC. 3.107. *Dual network operation.*—No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network: *Provided*, That this regulation shall not be applicable if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such network.

SEC. 3.108. *Control by networks of station rates.*—No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs.

[*Effective date.*] These regulations shall become effective immediately: *Provided*, That, with respect to existing contracts, arrangements, or understandings, or network organization station licenses, the effective date shall be deferred until November 15, 1941: *Provided further*, That the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties; *And provided further*, That the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties.

THE MINUTE OF OCTOBER 31, 1941

The Commission today adopted the following minute setting forth the procedure that it will follow in applying the policies announced in the Chain Broadcasting Regulations:

If a station wishes to contest the validity of the Chain Broadcasting Regulations adopted in Docket No. 5060, or the reasonableness of their application to the particular station, its license will be set for hearing. In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision.

The supplementary decision and order in Docket No. 5060 indefinitely suspended Regulation 3.107, relating to the operation of more than one network by a single network organization. No similar suspension was made of that portion of Regulation 3.106, relating to network operation of more than one standard broadcast station with substantially overlapping service areas. The Commission will postpone indefinitely any action to prevent such dual station operation if it is shown that the operation of two stations in any city is indispensable to the continued operation of two networks by a single network organization.

The adoption of the foregoing procedure is without prejudice to the rights of any person who may petition the Commission for modification or stay of the Chain Broadcasting Regulations.

SUPREME COURT OF THE UNITED STATES.

No. 1026.—October Term, 1941.

Columbia Broadcasting System, Inc., Appellant, *vs.* The United States of America, Federal Communications Commission and Mutual Broadcasting System, Inc.	Appeal from the District Court of the United States for the Southern District of New York.

[June 1, 1942.]

Mr. Justice Frankfurter, dissenting.

The criteria governing judicial review of "orders" under the Urgent Deficiencies Act were defined by a unanimous Court in *United States* v. *Los Angeles R. R.*, 273 U. S. 299, 309-10: "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation." If "broadcasting company" were substituted for "carrier", this analysis of the legal consequences of the action of the Interstate Commerce Commission in the *Los Angeles* case would fit perfectly the legal consequences of the action of the Federal Communications Commission in making public the challenged regulations.

The fact that an action of an administrative agency occasions even irreparable loss does not in itself afford sufficient grounds for judicial review. Even if the Commission committed a wrong, the question of judicial reviewability still remains that put in the *Los Angeles* case, 273 U. S. at 313, to wit, is it "a wrong for which Congress provides a remedy under the Urgent Deficiencies Act" of October 22, 1913, 38 Stat. 208, 219, as incorporated in § 402(a) of the Communications Act of 1934?

For Congress has not authorized resort to the federal courts merely because someone feels aggrieved, however deeply, by an

action of the Federal Communications Commission. A District Court of the United States can take a case only when Congress has authorized that type of case to be taken. Congress did not leave opportunity for reviewing damaging action by the Federal Communications Commission to the general equity powers of the district courts. It circumscribed the power of the courts in relation to the Commission in the most detailed way. Its incorporation by reference, in the Communications Act of 1934, of the scope of review allowed in reviewing an "order" of the Interstate Commerce Commission gave all the precise, definite, and technical boundaries which the concept of a reviewable "order" had acquired through the decisions of this Court prior to the enactment of the Communications Act. The precise requirements of an "order" of the Commission for purposes of judicial review are therefore as inflexible as though they were written into the Act itself.

Our problem, then, is this: Does the issuance of the chain broadcasting regulations constitute an "order" reviewable in a proceeding brought under § 402(a) of the Communications Act, in the light of the settled rules for determining what such an "order" is when a determination of the Interstate Commerce Commission is made the basis of judicial review. It is therefore necessary to put out of mind what this case is not. It is not the invocation of equity jurisdiction in order to avoid threatened irreparable harm resulting from the criminal enforcement of an unconstitutional statute, as in *Pierce* v. *Society of Sisters*, 268 U. S. 510. Nor do we have here a resort to equity because it is essential for the protection of asserted rights that criminal prosecutions unauthorized by law be restrained, as in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 183.

In promulgating these regulations the Communications Commission merely announced its conception of one aspect of the public interest, namely, the relationship of certain provisions in network-affiliation contracts to the obligation of a station licensee to render the most effective service to the listening public. The regulations themselves determine no rights. They alter the status of neither the networks nor licensees. As such they require nobody—neither the networks, the licensees, nor the Commission—to do anything. They are merely an announcement to the public of what the Commission intends to do in passing upon future applications for station licenses. No action of the stations or the

networks can violate the regulations, for there is nothing the regulations require them to do or refrain from doing.

Announcements of general policies intended to be followed by administrative agencies customarily take any one of various forms. Sometimes they are noted in the agency's annual report to Congress, sometimes in a public announcement or press release, and sometimes, as was the case here, they are published as "rules" or "regulations". See Final Report of the Attorney General's Committee on Administrative Procedure (1941), pp. 26-27. But whatever form such announcements may take, their nature and effect is the same. The reason why the Commission formulated its chain broadcasting policy in the form of a "regulation" is given in its report: "We believe that the announcement of the principles we intend to apply in exercising our licensing power will expedite business and further the ends of justice. . . . Good administrative practice would seem to demand that such a statement of policy or rules and regulations be promulgated wherever sufficient information is available upon which they may be based." Report on Chain Broadcasting, Federal Communications Commission, Order No. 37, Docket No. 5060, p. 85.

With respect to its jurisdiction over matters relating to radio broadcasting, the Communications Commission is essentially a licensing agency. Its regulatory power over the industry is derived, for the most part, from its authority to grant and withhold station licenses. Under § 309 of the Communications Act of 1934 the Commission is required to examine each application for a station license and to determine in each case whether a grant would serve public interest, convenience, or necessity. As was noted in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138, the Act "expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." To that end Congress established an administrative procedure under which the Commission must make a specific determination in each case whether the public interest would be served by granting the particular application before it. No announcement of general licensing policy can relieve the Commission of its statutory obligation to examine each application for a license and determine whether a grant or denial is required by the public interest.

The Commission recognized this fact in issuing these regulations. It explicitly stated that a determination of the requirements of

the public interest will, in spite of the regulations, still have to be made in passing upon particular applications: "Announcements of policy may take the form of regulations or of general public statements. In either case, the applicant's right to a hearing on the question whether he does in fact propose to operate in the public interest is fully preserved. The regulations we are adopting are nothing more than the expression of the general policy we will follow in exercising our licensing power. The formulation of a regulation in general terms is an important aid to consistency and predictability and does not prejudice any rights of the applicant." Report on Chain Broadcasting, *supra*, p. 85.

Subsequent to the promulgation of the regulations, the Commission found that substantial modifications were necessary. In its supplemental report on these amendments the Commission gave further evidence of the flexible nature of the regulations: "The Commission stands ready at all times to amend and modify its regulations upon the petition of any network, national or regional, or any station or group of stations if it can be shown that those regulations prevent profitable network operations, or unduly disturb any aspect of broadcasting, or that because of special or changed circumstances the chain broadcasting regulations should not be applicable to any particular situation." Moreover, in its Minute of October 31, 1941, designed primarily to protect the interests of station licensees who contest the validity of the regulations, the Commission again made it abundantly clear that the regulations were not final: "If a station wishes to contest the validity of the Chain Broadcasting Regulations . . . , or the reasonableness of their application to the particular station, its license will be set for hearing."

The regulations do not, therefore, commit the Commission to any definitive course of action in passing upon applications for licenses. Consistently with the regulations (and, parenthetically, consistently with the authority of the Commission to depart from general regulations where such departure is in the public interest, see *Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 285), the Commission is free to dilute them with amendments and exceptions. The construction of the regulations and their application to particular situations is still in the hands of the Commission. Administrative adjudication is still open. Before its completion it is not ripe for judicial review.

The characteristics of the administrative determinations in all the cases on which the Court's opinion relies were wholly different. In each one the force of the law either through criminal prosecution or injunction or fine or some other judicial remedy could immediately be brought to bear to enforce the command of the administrative agency. In none of the cases was an administrative action held reviewable which in itself entailed no immediate legal consequences.

Thus, in the *Assigned Car Cases*, 274 U. S. 564, suit was brought under the Urgent Deficiencies Act to annul an order of the Interstate Commerce Commission prescribing for all railroads within its jurisdiction a rule governing distribution of cars for the transportation of bituminous coal. Under § 402 of the Transportation Act of 1920, 41 Stat. 456, 476, 49 U. S. C. § 1(12)(14), the carriers were required "to make just and reasonable distribution of cars", and the Commission was authorized to "establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad". Failure of a carrier to comply with such regulations issued by the Commission was declared unlawful, subjecting the carrier to a fine of $100 for each offense. Since the order of the Commission commanded carriers to take specified actions, and since the failure to comply with the order would bring immediate legal sanctions, the order was held reviewable.

Similarly, in *United States* v. *B. & O. R. Co.*, 293 U. S. 454, the Interstate Commerce Commission required railroads subject to its jurisdiction to equip locomotives with a suitable type of power-operated reverse gear. The Boiler Inspection Act, 36 Stat. 913, 916, expressly provided that violation by a carrier of any rule or regulation issued by the Commission under the Act was punishable by a fine recoverable in a civil action. A suit under the Urgent Deficiencies Act to set aside the Commission's order was therefore entertained.

A. T. & T. Co. v. *United States*, 299 U. S. 232, was a suit under § 402(a) of the Communications Act of 1934, the same provision upon which jurisdiction of the present litigation is based, to set aside an order of the Federal Communications Commission prescribing a uniform system of accounts for telephone companies within the Act. Section 220(a) authorized the Commission to prescribe such forms of accounts, and § 220(d) made the failure or refusal of a company to keep accounts in the manner prescribed

by the Commission unlawful, punishable by a $500 forfeiture for each day of the continuance of the offense. Because of the legal sanctions immediately attaching upon its violation, the order was held reviewable.

In *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, the Commission, under the authority vested in it by § 20 of the Interstate Commerce Act, issued orders prescribing forms of accounts, records, and memoranda and calling for annual reports of carriers by water. Section 20(7) made it unlawful for such carriers to keep any accounts other than those prescribed by the Commission. A suit to set aside the orders was therefore entertained. Similarly, in *Kansas City So. Ry.* v. *United States*, 231 U. S. 423, suit was brought to annul regulations of the Interstate Commerce Commission prescribing a uniform bookkeeping and accounting system for interstate railway carriers. Since carriers who failed to keep accounts as ordered by the regulations were subject to penalties under § 20(7) of the Act, jurisdiction was taken. And in *Chicago, R. I. & P. Ry. Co.* v. *United States*, 284 U. S. 80, the Interstate Commerce Commission prescribed car-hire settlement rules governing use by common carriers of each other's cars. Violation of such rules by carriers was declared unlawful and subject to fines. Consequently, a suit to set aside the rules was entertained.

Of course, the mere fact that an administrative order determines a status does not mean that it is not reviewable. If an administrative determination of status has the effect of subjecting a person to legal obligations, whether embodied in statute or previously formulated administrative commands, or otherwise affecting legal rights, such a determination possesses the elements of a reviewable order. Thus, in *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, the Federal Communications Commission had issued orders requiring all telephone carriers subject to the Communications Act of 1934 to file schedules of their charges, copies of contracts with other carriers, etc. Section 203(e) of the Act provides that a carrier which fails or refuses to comply with such rules of the Commission shall forfeit $500 for each offense, and $25 for each day of its continuance. After investigation and hearing, the Commission determined that the Rochester Telephone Corporation was a telephone carrier subject to the Act and therefore subject to the previously promulgated general orders directed to carriers within

the Commission's jurisdiction. "The order of the Communications Commission in this case was therefore reviewable. It was not a mere abstract declaration of status of the Rochester under the Communications Act, nor was it a stage in an incomplete process of administrative adjudication. The contested order determining the status of the Rochester necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority. Into this class of carriers the order under dispute covered the Rochester, and by that fact, in conjunction with the other orders, made determination of the status of the Rochester a reviewable order of the Commission." *Rochester Tel. Corp.* v. *United States*, 307 U. S. at 143-44. Compare *A. F. of L.* v. *Labor Board*, 308 U. S. 401, 408. Unlike the action taken by the Federal Communications Commission in the *Rochester* case, its action here carried no directions of obedience of any kind to anyone.

It is said that the regulations derive legal effect through § 312(a) giving the Commission authority to revoke licenses, and that "by virtue of the regulations alone", the networks and their affiliates are now subjected to legal detriment. But this is merely another way of phrasing the main contention that the regulations at once and without further action by the Commission release legal sanctions. But the regulations have no such effect. To be sure, the Commission can revoke a station license "because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application". But the Commission may never require a licensee to file a statement of fact under § 312(a); its provisions may therefore never come into operation. In any event, the regulations as such do not subject licensees to any sanctions. A license can be revoked under § 312(a) because of the licensee's failure to operate its station in the public interest, as required by the statute. The regulations adopted by the Commission cannot operate to revoke any licenses. It is only after a proceeding has been started (in which the licensee is entitled to a hearing during which the revocation order is suspended) and adversely concluded against a party that legal sanctions come into play—the Commission can bring proceedings to enforce its order of revocation and, correspondingly, the licensee can bring suit under § 402(a) challenging the validity of the Commission's termination of the license.

Section 502 of the Communications Act provides that the violation of "any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act" shall be a criminal offense. Would the renewal by a licensee of its network-affiliation contract subject it to the criminal penalties imposed by § 502? Obviously not, for the regulations do not forbid a licensee from taking that or any other action. And, for the same reason, a license could not be revoked under the provision of § 312(a) which authorizes revocation "for violation of or failure to observe . . . any regulation of the Commission authorized by this Act. . . ." If the Commission had issued regulations which ordered licensees to do or refrain from doing something, the problem would be entirely different. Violation by a licensee of such a regulation would be grounds for revocation of its license, under § 312(a), and for the imposition of criminal penalties, under § 502. And, the other requisites being present, such a regulation could be reviewed as a final administrative determination.

This leaves only the suggestion that since the action taken by the Commission, although not the completion of its adjudicatory process, nevertheless drastically affects substantial business interests, it is proper for the courts to intercede at this stage. Even if this argument were to be considered as if it had never before been made to and rejected by this Court, its infirmities are obvious. As a practical matter, the impact upon the business operations of the networks and their affiliated stations would probably be as disturbing as if the policies formulated in the regulations had been expressed through a press release, or if only the report, which is not only the foundation of the regulations but also embodies them, had been published without the regulations which are only the summary of the report, or if Congress itself had incorporated these regulations into the text of the Communications Act. It will hardly be argued that any of these steps could be the subject of judicial review before the Commission acted upon particular applications. But assume that the greater formality given to the announcement of the Commission's statement of policy through the regulations intensified the practical business consequences. Congress has not conferred upon the district courts jurisdiction over "practical business consequences". They can review action of administrative agencies only when there is an "order", and when Congress in § 402(a) made only an "order" of the Communications Commis-

sion reviewable, it incorporated the settled doctrine established by an unbroken series of decisions in this Court that the courts could review only a final determination by an agency whereby its administrative process has been concluded.

This is not the first time that the federal courts have been urged to sit in judgment upon "practical business consequences" where the action to be reviewed did not represent the final stage of administrative adjudication. The arguments made in this case have been made in the past but heretofore have always been rejected by this Court. The classic formulation and application of the doctrine of finality as to orders under the Urgent Deficiencies Act was contained in *United States* v. *Los Angeles R. R.*, 273 U. S. 299. In view of the thoroughness of the argument at the bar, and the weightiness of the opinion, that case has ever since been regarded as furnishing the guideposts in this field of law. It should govern here.

Suit was brought there to annul and enjoin an order of the Interstate Commerce Commission determining the final valuation for rate-making purposes of the Los Angeles & Salt Lake Railroad Company which operated a thousand miles of railroad lines. The valuation fixed by the Commission was $45,200,000; the carrier claimed that if the Commission had employed proper standards of valuation, the figure would be $70,000,000, a difference of $24,800,000. At the time suit was brought approximately 250,000 miles of railroad lines throughout the country were undergoing valuation. The validity of the criteria employed by the Commission in the case of the Los Angeles & Salt Lake Railroad Company was therefore of enormous national significance. In the words of Commissioner Eastman, "This case deals with an issue of greater moment to the country than any that we have ever determined." 75 I. C. C. 523. These issues, involving practically every phase of valuation law, were canvassed in an adversary proceeding before the Commission lasting nearly a year and a half, resulting in a report of one hundred and forty pages, and expressed in a formal "order" of ten pages. Counsel for the railroad company there, as do counsel for the broadcasting company here, relied upon the practical finality of the order as a basis for review: "As a practical matter, the Commission in any and all proceedings in which it has occasion to use this valuation will give it not *prima facie* but conclusive effect. In the valuation proceeding before the Commission which resulted in this order

petitioner introduced its evidence of the value of the properties and the proceeding resulted in a valuation greatly at variance with the evidence and contentions of petitioner. No greater effect will be given to evidence which petitioner may introduce in some future proceeding before the Commission in an attempt to overcome the *prima facie* effect accorded by the Act to this valuation order. Therefore, unless and until set aside and annulled, this valuation will stand as a continuing menace against petitioner, and may be repeatedly used to petitioner's prejudice in rate, division, consolidation, security-issue and recapture proceedings." Brief for Appellee, pp. 64-65.

The Court specifically referred to this argument of counsel: "One [argument in support of jurisdiction] is that since the Commission has by reason of errors of law and of judgment grossly undervalued the property, its report will, unless suppressed, injure the credit of the carrier with the public." Finding, however, that the order did not finally determine any legal rights, the Court refused review: "Its [the Commission's] conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction." 273 U. S. at 314-15.[1]

To argue that irreparable injury implies reviewability is in effect to contend that there must be a remedy because the plaintiff claims serious damage. But in these situations—in reviewing "orders" under the Urgent Deficiencies Act—federal courts can give a remedy only to enforce a legal right, and a legal right cannot be derived merely by concluding that a particular claim of hardship should afford a remedy. While formally we may appear to be dealing with technicalities, behind these considerations lie deep issues of policy in the division of authority as between administrative agencies and courts in carrying out the constitutional will of Congress. The source of the misconception underlying the claim for equitable relief in this case is the assumption

[1] To the same effect is United States v. Illinois Cent. R. R. Co., 244 U. S. 82. There the Interstate Commerce Commission issued an order fixing the time and place for hearing complaints made by various coal companies seeking damages against railroads for failing to supply a sufficient number of coal cars for their shipping needs. The railroads brought suit under the Urgent Deficiencies Act to annul this order, alleging that unless the hearing were restrained, the railroads would be put to enormous expense and inconvenience. The Court held that the notice of hearing "had no characteristics of an order, affirmative or negative", and since it "was a mere incident in the proceeding", the suit could not be entertained. 244 U. S. at 89.

that this is merely an ordinary invocation of equity, as though it were a controversy between two litigants of which only the courts are or can be seized. What we are here concerned with is due regard for the proper distribution made by Congress of legal authority as between two law-enforcing agencies of government, the administrative and the judicial. See *United States* v. *Morgan*, 307 U. S. 183, 190-91; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134.

This case illustrates anew the influence of a particular instance of felt hardship in derailing legal principles from customary tracks. But this is not an isolated case. If threatened damage through general pronouncement of policy for future administrative action, even if cast in the formal language of a regulation, is to give rise to equitable review apart from the rule that judicial review is premature because of want of administrative finality, the same basis of irreparable harm which is here equated to jurisdiction will bear rich litigious fruit in the case of "regulations" issued by the Securities and Exchange Commission which are damaging in their immediate repercussions to stock exchange and holding companies, or regulations announced by the Treasury for the guidance of taxpayers but which adversely affect business interests, or regulations by the Federal Power Commission, etc. Suppose, for example, that the Commissioner of Internal Revenue issues a ruling that profits derived by radio stations from their network operations are subject to a tax deemed by them onerous and illegal. Could a network successfully bring a suit in equity prior to the imposition of such taxes to invalidate the ruling on the ground that its practical consequence was the cancellation of or refusal to renew network affiliations? One had supposed that the answer was clearly no. But surely in principle the problem is essentially that of the cases before us.

A final consideration remains. We are not dealing with the reviewability of administrative orders *in vacuo*. The reviewability of an order of the Federal Communications Commission depends upon the statutory scheme of judicial review embodied in § 402 of the Communications Act of 1934. Therefore, even if the regulations could be deemed to possess the essential attributes of a reviewable order, it would not inevitably follow that the order is reviewable in the manner provided for by § 402(a) of the Act. The scope and historical background of the provisions for judicial re-

view contained in the Communications Act of 1934 have too recently been canvassed, see *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, — U. S. —; *Federal Communications Commission* v. *Columbia Broadcasting System*, 311 U. S. 132; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, to require detailed consideration here. Briefly, the Act created two avenues by which orders of the Federal Communications Commission were open to review by the federal courts. Under § 402(a), incorporating the provisions of the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219, relating to judicial review of orders of the Interstate Commerce Commission, a suit to enforce, set aside, annul, or suspend an order of the Federal Communications Commission may be brought in a specially constituted district court, with a right of direct appeal to this Court, only if the order does not fall within the exceptions enumerated by § 402(b), namely, orders granting or denying applications for station licenses or construction permits and for renewal or modification of licenses. Review of the orders comprehended within § 402(b) is available only through an appeal to the Court of Appeals for the District of Columbia, with no right of direct appeal to this Court.

If the regulations do constitute an order, what kind of an order can it be? It must be in the nature of a blanket denial, operating *in futuro*, to be sure, of applications for renewal of station licenses. But the Act expressly precludes judicial review of orders denying renewal applications of licensees in any manner other than that prescribed by § 402(b), to wit, by an appeal to the Court of Appeals for the District of Columbia. As the court below held, the effect of taking jurisdiction in these cases is to substitute a different court and a different procedure for those specified by Congress. This Court has not in the past displayed such an indifference to the particularities of legislation defining the jurisdiction of the lower federal courts. On the contrary, only last Term did the Court insist upon strict compliance with the statutory scheme for judicial review established by the Communications Act of 1934. See *Federal Communications Commission* v. *Columbia Broadcasting System*, 311 U. S. 132.

Even if we were free to disregard the scheme for judicial review which Congress has established, I could not agree that an appeal under § 402(b) would not be an adequate means for testing the

claims made in the present litigation. There is essentially only one issue on the merits in this proceeding, namely, whether the adoption by the Commission of the policies expressed in the regulations transgresses its statutory and constitutional authority. But this issue could be raised and fully determined in an appeal under § 402(b) from an order denying a renewal application. Indeed, in its Minute of October 31, 1941, the Commission explicitly stated that the validity of the regulations could be put in issue in a renewal proceeding. If anything, therefore, the issues in an appeal under § 402(b) would be broader and not narrower than the issues here. Moreover, since the reasonableness of the application of the regulations to the particular situation would also be in issue in the renewal proceeding, the reviewing court would have before it a record containing elements of concreteness and particularity not present in the record now before us.

The Commission's Minute enables a licensee to contest the validity of the regulations, or the reasonableness of applying them to the particular case, without fear of losing its license. "In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding [contesting the validity of the regulations] and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision."

Plainly, therefore, a licensee is under no compulsion to cancel or modify its affiliation contract. Licensees who regard the regulations as invalid are free to continue their existing contracts and at the same time challenge the regulations in the orderly manner provided by the Act—and without any danger of losing their right to continue broadcasting. Similarly, the interests of the networks may be protected through intervention in renewal proceedings. Under the Commission's procedure, Rule 1.102 of the Rules of Practice and Procedure, where a renewal application is designated for hearing because of the licensee's contractual ar-

rangements with others, the latter are customarily permitted to intervene. See, for example, Application of E. J. Regan and F. Arthur Bostwick, Docket No. 5788; Application of John H. Stenger, Jr., Docket No. 543; Application of Ocala Broadcasting Co., Docket No. 6000; Application of Panama City Broadcasting Co., Docket No. 6001.

We need go no farther than this litigation to perceive the unfortunate effects of premature judicial review. The chain broadcasting regulations were issued on May 2, 1941, more than a year ago. They were adopted by the Commission as a consequence of its finding, after an investigation lasting more than three years, that certain features of network-affiliation contracts prevented licensees from effectively discharging their obligation to render the fullest service to the listening public. The policy formulated by the Commission may or may not be wise—that is not our concern. But we cannot blink the fact that this litigation has for more than a year prevented the Commission from testing by experience the practical wisdom of a policy found by it to be required by the public interest. The commencement of a proceeding under § 402(b) would not have presented the jurisdictional problems present in this proceeding. Surely those desirous of a speedy adjudication of the issue of the validity of the regulations were aware that the commencement of a proceeding under § 402(a) would not produce a prompt adjudication on the merits, but that it would instead result in postponing for a considerable period the effective date of the regulations, with all the contingent advantages afforded by such postponement.

Hardship there may well come through action of an administrative agency. But to slide from recognition of a hardship to assertion of jurisdiction is once more to assume that only the courts are the guardians of the rights and liberties of the people. In denying that it had power to review the action of the Federal Communications Commission because that body had not yet determined a legal right, the court below, as Judge Learned Hand's opinion abundantly proves, was not respecting a rule of etiquette. On the contrary, it merely recognized that the federal courts are entrusted with the correction of administrative errors or wrongdoing only to the extent of Congressional authorization. To say that the courts should reject the doctrine of administrative finality and take jurisdiction whenever action of an administrative agency

may seriously affect substantial business interests, regardless of how intermediate or incomplete the action may be, is, in effect, to imply that the protection of legal interests is entrusted solely to the courts. The unbroken current of this Court's decisions in construing the scope of judicial review under the Urgent Deficiencies Act, and which is the only warrant for jurisdiction in this case, repels such a contention. The decision should therefore be affirmed.

Mr. Justice REED and Mr. Justice DOUGLAS join in this dissent.